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In the Supreme Court of the United States

MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

MARATHON OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, an asserted delay in the processing of a plan of exploration to perform environmental studies required by Congress was a material breach, or a repudiation, of federal offshore oil and gas leases.

2. Whether, in the circumstances of this case, the lessees waived any claim for rescission and restitution by continuing to require performance by the United States under the leases and by requesting and obtaining a rent-free extension of the leases commensurate with the asserted processing delay.

3. Whether, in the circumstances of this case, if a breach occurred that was not waived, the proper remedy is (i) a rent-free extension of the leases commensurate with the asserted processing delay or (ii) cancellation of the leases and restitution to the lessees of the payments made to secure the leases.

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OPINIONS BELOW

The opinion of the court of appeals upon panel rehearing (Pet. App. 3a-24a) is reported at 177 F.3d 1331.[1] The original opinion of the court of appeals that was subsequently withdrawn (Pet. App. 25a-43a) is reported at 158 F.3d 1253. The opinion of the Court of Federal Claims (Pet. App. 45a-99a) is reported at 35 Fed. Cl. 309.

[1] Unless otherwise noted, citations in this brief to "Pet. App." are to the appendices of the petition filed in No. 99-253.

JURISDICTION

The revised opinion and judgment of the court of appeals were entered on May 13, 1999 (Pet. App. 1a-24a). The petition for a writ of certiorari in No. 99-244 was filed on August 10, 1999. The petition for a writ of certiorari in No. 99-253 was filed on August 11, 1999. The petitions were granted on November 15, 1999. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, the Coastal Zone Management Act (CZMA), 16 U.S.C. 1451 *et seq.*, and the Outer Banks Protection Act (OBPA), Pub. L. No. 101-380, § 6003, 104 Stat. 555 (repealed 1996), appear at Pet. App. 100a-173a.

STATEMENT

Petitioners seek to recover from the United States the amounts they paid to obtain federal oil and gas leases on the outer continental shelf. The court of appeals correctly held that the facts of this case do not warrant the restitutionary relief that petitioners request. Petitioners failed to show any material breach by the United States of its obligation under the leases, or indeed any breach at all. The gravamen of their complaint is that a now-repealed intervening statute (the Outer Banks Protection Act) interfered with their rights under the leases, but the court of appeals correctly found that the Act resulted in no delay or alteration of any right petitioners otherwise would have enjoyed. Petitioners' claim for rescission is, in any event, foreclosed by their conduct electing to require further performance by the United States under the leases at substantial additional public expense.

I. Introduction And Statutory Background

1. This case involves the proper interaction of legislation that seeks, on the one hand, to preserve and protect the environment while, on the other hand, allowing development of certain natural resources on federal lands. The case arises in the context of federal oil and gas leases obtained by petitioners for submerged lands offshore of North Carolina. The offshore lands that petitioners have sought to develop are located at what is known as "The Point"—the area offshore of the Outer Banks at "the convergence of the Gulf Stream, continental slope, and shelf waters." J.A. 207. It "is an area characterized by unique physical and biological qualities." *Ibid.* "One of the East Coast's most important commercial and recreation fisheries is located in the waters overlying the proposed drill site." *Id.* at 225. This "area serves as an important migratory pathway and feeding habitat" for many fish species, and "an important food source * * * would be exposed to * * * wastes" resulting from drilling activities in this location. *Ibid.* The areas that petitioners have sought to develop are a "highly productive and ecologically unique area essential to the State's coastal zone." *Id.* at 207. The statutory context in which the leases for these areas were issued, and are to be administered, is highly protective of these important environmental interests.

2. The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, was enacted by Congress in 1953. The Outer Continental Shelf (OCS) is the submerged land beneath navigable waters on the Continental Shelf beginning seaward of the coastal waters within the jurisdiction of the individual States. See 43 U.S.C. 1301(a), (b), 1331(a). The States exercise jurisdiction over the waters and submerged lands within three miles of their coasts. See 43 U.S.C. 1311(a), (b), 1312. Pursuant to the OCSLA, the federal government exercises jurisdiction over the OCS and

ownership of the mineral resources found there. Pet. App. 4a; 43 U.S.C. 1332, 1333.

The OCSLA establishes a detailed framework for issuing mineral leases on the OCS by competitive bidding and for the approval of related activities under the leases. The Secretary of the Interior is authorized to administer the Act's provisions relating to the leasing of the OCS. 43 U.S.C. 1334, 1337, 1343-1346. The Secretary is also directed to promulgate rules and regulations to carry out those provisions—including regulations for the prevention of waste and for conservation of the natural resources of the OCS—and the statute specifies that such regulations shall apply to all operations conducted under any OCS lease. 43 U.S.C. 1334, 1337 (1994 & Supp. III 1997). The Act specifies that these regulations "shall include, but not be limited to," provisions—

> (1) *for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease* or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) *if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life)*, to property, to any mineral deposits (in areas leased or unleased), *or to the marine, coastal, or human environment*, * * * .

43 U.S.C. 1334(a) (emphasis added). The OCSLA also directs the Secretary to promulgate regulations providing for the extension of OCS leases in the event of their suspension. *Ibid.* The regulations promulgated by the Secretary under this statute provide that the leases granted under the Act may be suspended (and thereby extended without rent) in order (i) to conduct an environmental analysis; (ii) to comply

with the National Environmental Policy Act; (iii) to avoid threats of serious harm or damage to life, property or the environment; or (iv) to compensate for inordinate delays encountered by lessees in obtaining required permits or consents for lease operations. 30 C.F.R. 250.110(b) (formerly codified at 30 C.F.R. 250.10(b) (1997)).

The Secretary is required to conduct environmental analyses to ensure that serious harm or damage to the environment will not occur and is to offer OCS leases through a competitive bidding process. 43 U.S.C. 1337(a), 1346(a) (1994 & Supp. III 1997). An OCS lease does not grant the lessee an unfettered right to explore and develop the leased area. Instead, the lessee obtains a priority over others in submitting for federal approval plans for exploration, production, or development. *Secretary of the Interior* v. *California*, 464 U.S. 312, 317, 337 (1984); *Tribal Village of Akutan* v. *Hodel*, 869 F.2d 1185, 1187 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989). Before the lessee may actually explore and develop the leased area, numerous conditions must be satisfied under the leases. In particular, the lessee must obtain mandatory state and federal approvals before any exploration activities may proceed. Pet. App. 5a-6a. The purchase of the lease rights and the payment of the lease rentals does not guarantee the lessee that any of the state or federal approvals required before exploration can occur will in fact be granted. As this Court explained in *Secretary of the Interior* v. *California*, 464 U.S. at 339:

> Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production * * * ; the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted.

3. Among the numerous requirements that must be met by a lessee before exploration and development may occur, the following are involved in this case:

a. The lessee must submit a plan of exploration for approval by the Secretary. 43 U.S.C. 1340(b), (c)(1). The Secretary may approve the exploration plan only if it is consistent with the OCSLA, with the regulations prescribed pursuant to OCSLA, and with the provisions of the lease. 43 U.S.C. 1340(c)(1). As part of the approval process, the Secretary must evaluate the environmental impacts of the activities described in the plan of exploration. 30 C.F.R. 250.203(g) (formerly codified at 30 C.F.R. 250.33(g) (1997)). In making that evaluation, the Secretary is to consider the written comments of the Governor of any affected State. 30 C.F.R. 250.203(h) (formerly codified at 30 C.F.R. 250.33(h) (1997)). If an acceptable plan of exploration is submitted to the Secretary, it is to be approved within 30 days of submittal. 43 U.S.C. 1340(c)(1). The power that the Secretary has under 43 U.S.C. 1334(a) to suspend leases while evaluating potential environmental harms (see page 4, *supra*), however, also authorizes him to suspend the 30-day approval process for exploration plans for this same purpose. H.R. Rep. No. 590, 95th Cong., 2d Sess. 49 (1978). The Secretary is directed by the OCSLA to disapprove any plan of exploration that would likely cause any condition described in 43 U.S.C. 1334(a)(2)(A)(i)—such as harm or damage to life (including fish and other aquatic life), to property, to any mineral, to the national security or defense, or to the marine, coastal, or human environment—if the plan cannot be modified to avoid that condition. 43 U.S.C. 1340(c)(1).

b. If the plan of exploration would affect the land, water use, or the natural resources of the coastal zone of any State, the plan may not be implemented unless the further requirements of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1451, *et seq.*, have been satisfied. Under the CZMA,

each State may adopt a Coastal Zone Management Plan for the protection and management of its coastal areas. The Secretary is not to "grant any license or permit for any activity described in detail in the exploration plan" until the lessee has complied with the state-approval procedure established in the CZMA. 16 U.S.C. 1456(c)(3)(B); 43 U.S.C. 1340(c)(2). Under that procedure, the lessee makes an initial certification that its plan of exploration is in compliance with the State's Coastal Zone Management Plan. If the State objects to the lessee's certification, the lessee may appeal the State's objection to the Secretary of Commerce. The Secretary of Commerce may override the State's objection only upon a finding that the plan is consistent with the objectives of the Coastal Zone Management Act or is necessary in the interest of national security. 16 U.S.C. 1456(c)(3)(B)(i)-(ii); 43 U.S.C. 1340(c)(2). If the State has objected to the certification, and if the Secretary of Commerce does *not* override the State's objection, then *no* operations may be conducted under the plan of exploration. 43 U.S.C. 1340(c)(2). In that situation, the lessee must either satisfy the State's objections or submit an alternative exploration plan. 16 U.S.C. 1456(c)(3)(B). See J.A. 253-256, 329-332.

c. If the lessee's plan of exploration contemplates the discharge of any pollutants into the ocean, the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, also requires the lessee to obtain a National Pollutant Discharge Elimination System (NPDES) permit from the Environmental Protection Agency. 33 U.S.C. 1311(a), 1342(a). An NPDES permit cannot be obtained unless the lessee has first complied with the state-approval requirement of the CZMA. The lessee must thus certify that the discharge would be in compliance with the Coastal Zone Management Plan of the affected State. If the State objects to that certification, the Secretary of Commerce may override the State's objection only upon a finding that the drilling plan would be consistent

with the objectives of the CZMA or is necessary in the interest of national security. 16 U.S.C. 1456(c)(3). If the Secretary of Commerce does not override the State's objection, a discharge permit may *not* be issued by the EPA. *Ibid.*

d. A lessee must obtain a permit to drill before commencing any exploratory well under an approved plan of exploration. 43 U.S.C. 1340(d); 30 C.F.R. 250.414 (formerly codified at 30 C.F.R. 250.64 (1997)). If such an exploratory well is authorized and proves successful, the lessee must then obtain approval of a development and production plan before pursuing further activity. 43 U.S.C. 1351. Drilling permits and development and production plans may be approved only if the state-approval requirements of the CZMA have been satisfied. See 43 U.S.C. 1340(c)(2), 1351(d).

e. These restrictions on operations are expressly set forth in the lease terms and in the governing statutes and regulations. Oil and gas exploration companies such as petitioners, who are "knowledgeable and sophisticated purchasers," enter into such leases fully aware of the limitations they impose on potential operations. Pet. App. 13a.

II. *Petitioners' Leases*

4. Between 1981 and 1983, petitioners bid on and obtained ten-year federal oil and gas leases offshore of the Outer Banks area of North Carolina. C.A. App. 180-183. Each of the leases was issued on a standard form. Under that lease form, the parties' rights were subject to all of the provisions and terms of the OCSLA and its regulations, to "all other applicable statutes and regulations," and to other regulations issued in the future that provide for the prevention of waste and the conservation of the natural resources of the OCS. Pet. App. 175a. The leases specify that they may be suspended or canceled by the United States under the terms set forth in the OCSLA. *Id.* at 180a.

5. During the 1980's, petitioners joined with the owners of adjacent OCS leases to form a single exploration unit known as the Manteo Unit. Pet. App. 7a. That unit contained four of the five leases involved in this case. C.A. App. 180-183, 251. Petitioner Mobil Oil Exploration and Producing Southeast, Inc. (Mobil) was the operator of the unit. C.A. App. 210.[2]

As unit operator, Mobil met in 1988 with representatives of the Minerals Management Service (MMS) of the Department of the Interior and the State of North Carolina to commence discussions regarding a potential exploratory well on the Manteo Unit. At that meeting, the Governor of North Carolina expressed the State's "grave concerns about the impacts development of any hydrocarbon resources [in that area of the Outer Banks] would have on the State's valuable estuarine system and other important coastal resources." J.A. 61. The Governor emphasized that (*id.* at 61-62):

> the earlier environmental impact statements (EIS), completed before and after the leases were issued are unsound for some topics. The level of scientific information for these ocean areas has increased dramatically since 1981. It shows unquestionably that the prior analyses were based on flawed data and assumptions. Direct and indirect onshore impacts from a discovery the size Mobil is projecting were never sufficiently analyzed.

In particular, the State expressed the concern that new information regarding fisheries, oil spill trajectories, and ocean currents and conditions was needed to ensure that petitioners' plan of exploration would comply with the

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[2] The operating agreement specified that unit operations would "be suspended while compliance is prevented * * * by governmental rules, regulations, or orders * * * provided, however, that performance shall be resumed within a reasonable time after such cause has been removed * * *." C.A. App. 236.

State's Coastal Management Plan and other applicable environmental requirements. *Ibid.*; see *id.* at 61-75.

6. Knowing that the State's objection was a potential bar to operations under these leases, Mobil entered into lengthy negotiations with the State and the MMS which resulted in a Memorandum of Understanding (MOU) dated July 12, 1989. Under the MOU, Mobil agreed to submit a draft plan of exploration for review by the State and MMS undertook to complete an Environmental Report (ER) on the exploratory well proposed by Mobil. J.A. 79. Mobil also requested and obtained a temporary "suspension" of its leases (J.A. 83) which "put the leases on hold, extended their terms, and suspended [lease] rental payment obligations." C.A. App. 128.3. The MOU further provided that "*[i]f the State objects to Mobil's certification of consistency [under the Coastal Zone Management Act], or if any other administrative or judical challenges or appeals arise*, or if the issuance of the permits for Mobil's exploration activities is delayed due to any of the other circumstances contemplated by 30 C.F.R. § 250.10," the MMS would "*issue additional suspensions of operations*, pursuant to 30 C.F.R. § 250.10, *to allow for the resolution of such matters* and to allow Mobil two drilling seasons under the [exploration plan] thereafter." J.A. 83 (emphasis added).

7. Pursuant to the MOU, Mobil submitted a draft plan of exploration for one exploratory well on the Manteo Unit on September 1, 1989. C.A. App. 268. MMS subsequently issued the draft ER required by the MOU. The State of North Carolina was unsatisfied with the draft exploration plan and the draft ER, however, because it believed that many unique facts regarding the oceanographic and coastal conditions of the Outer Banks area had not properly been taken into account. J.A. 86-95.

8. The draft plan of exploration for the Manteo Unit contemplated the discharge of wastes into the ocean. Mobil

was therefore also required to obtain an NPDES permit from EPA to pursue its plan. 33 U.S.C. 1311(a), 1342(a) (1994 & Supp. III 1997). As with respect to the permits required from the Secretary of the Interior before exploration may occur, an NPDES permit could not be issued by the EPA until Mobil obtained either the concurrence of the State of North Carolina to Mobil's CZMA compliance certification or an override by the Secretary of Commerce of any objection raised by the State. 16 U.S.C. 1456(c)(3).

When Mobil certified that its NPDES permit application complied with the North Carolina Coastal Management Plan on April 17, 1990 (J.A. 96-97), North Carolina made a timely formal objection to that certification on July 16, 1990. *Id.* at 106-112. The State's objection explained that Mobil had presented insufficient information to address and resolve the significant environmental concerns created by the proposed exploration plan. *Ibid.* The State complained that Mobil failed to provide "adequate site specific baseline data" and "has not fully documented assumptions used" in its models. *Id.* at 109. As the result, "the applicability of the models * * * cannot be judged." *Ibid.* The State concluded that "the only alternative is for Mobil to provide the required information," and that, after that information is provided, "the State will then be in a position to review the proposed activity to determine whether it may be conducted in a manner consistent with the North Carolina Coastal Management Program." *Id.* at 110.

Because of the State's objection, Mobil was not eligible to receive an NPDES permit for the proposed Manteo Unit exploration plan. 16 U.S.C. 1456(c)(3). Instead of providing the data and other information requested by the State, however, in July 1990 Mobil invoked the adversary procedures of the CZMA by seeking review of the State's objection before the Secretary of Commerce. J.A. 168. The commencement of that proceeding made petitioners' leases

eligible for suspension under the provisions of the MOU. See pages 9-10, *supra*.

III. *Enactment And Repeal Of The OBPA*

9. On August 18, 1990, the Outer Banks Protection Act (OBPA), was enacted as part of the Oil Pollution Act of 1990. Pub. L. No. 101-380, § 6003, 104 Stat. 555 (repealed 1996). The OBPA was enacted out of a concern of Congress that, in reviewing OCS activities affecting the Outer Banks region of North Carolina, the Department of the Interior needed to ensure that it was giving proper attention to the national environmental policies established under prior legislation such as NEPA and the CZMA. Congress noted that the Outer Banks of North Carolina was an area of exceptional environmental fragility, and that oil and gas development could adversely affect a fishing industry valued at more than $1 billion annually, as well as a major industry of the area, tourism. Congress noted its concern that there may be insufficient knowledge of the physical and oceanographic characteristics of the area and of the fish species that exist there. OBPA § 6003(b)(1)-(5), 104 Stat. 555. In particular, Congress expressed concern that the EIS prepared for the North Carolina lease sales before 1981 appeared insufficient and outdated and thereby failed to accomplish the objectives of federal environmental legislation. Congress found that more recent environmental inquiries had failed to allay concerns about the adequacy of information available to make decisions about leasing, exploration, and development offshore of North Carolina. OBPA § 6003(b)(6)-(8), 104 Stat. 555-556.

In light of these concerns about the sufficiency of environmental information for the uniquely fragile Outer Banks, the OBPA (i) required the establishment of an Environmental Sciences Review Panel (ESRP) to review the environmental issues affecting this area and (ii) directed the

Secretary not to make further lease sales or approve further exploration or development and production activities offshore of North Carolina until the later of October 1, 1991, or 45 days of continuous session of Congress after the Secretary submitted a written report to Congress, made after consideration of the findings and recommendations of the ESRP, certifying that available information *is* sufficient to enable the Secretary to carry out his responsibilities under the OCSLA in authorizing the activities listed above. OBPA § 6003(c)(3), 104 Stat. 556. The ESRP established by the OBPA was required to prepare and submit to the Secretary findings and recommendations:

> (i) assessing the adequacy of available physical oceanographic, ecological, and socioeconomic information in enabling the Secretary to carry out his responsibilities under the [OCSLA] with respect to authorizing [leasing, exploration, and development]; and
>
> (ii) if such available information is not adequate for such purposes, indicating what additional information is required to enable the Secretary to carry out such responsibilities * * * .

OBPA § 6003(e)(2)(A), 104 Stat. 557. The ESRP was to terminate its activities after submitting its findings and recommendations to the Secretary. OBPA § 6003(e)(4), 104 Stat. 558.

10. Following enactment of the OBPA on August 18, 1990, the MMS issued suspensions that applied generally to all leases offshore of North Carolina. J.A. 129-138. Under those suspensions, the terms of the affected leases were "extended for a period of time equal to the period the suspension is in effect" and "[n]o payment of rental is required during the period of this directed suspension." J.A. 130. At the time this general suspension was issued, the leases of petitioners

were already eligible for suspension under the specific terms of the MOU because of the State's earlier objection to the CZMA consistency certification for the NPDES permit. See pages 9-10, *supra*.

11. Following enactment of the OBPA, petitioners continued to treat their North Carolina leases as in effect and as binding upon the parties. They continued to exercise various rights under the leases and continued to seek and demand performance from the United States. In particular, on August 20, 1990, Mobil submitted for approval its final plan of exploration to drill one exploratory well on the Manteo Unit. J.A. 115. Accompanying that plan was a certification by Mobil that the plan of exploration satisfied the North Carolina Coastal Zone Management plan. The State of North Carolina promptly objected to that certification on November 19, 1990. *Id.* at 141-148. That objection conclusively barred the Secretary of the Interior from permitting any implementation of the proposed plan of exploration unless the State's objection was overturned by the Secretary of Commerce. 43 U.S.C. 1340(c)(1). In November 1990, petitioners therefore sought review of the State's CZMA objections before the Secretary of Commerce. J.A. 168.

That proceeding was conducted by the Secretary of Commerce jointly with his review of the State's prior CZMA objections to the NPDES permit application for that same unit. J.A. 168-169, 186-187, 196-336. North Carolina, along with 13 federal agencies and the National Security Council, took part in those administrative proceedings. *Id.* at 211, 277. The OBPA had no effect, and imposed no delay, on this review of the State's CZMA objections by the Secretary of Commerce. *Id.* at 186-187.

12. In January 1992, while petitioners' appeals to the Secretary of Commerce were still pending, the ESRP issued its final report to the Secretary of the Interior. That report

recommended that additional environmental data and studies be obtained before proceeding further with development of the Outer Banks. J.A. 149-164. The Secretary then issued a report to Congress, as required by the OBPA, in April 1992. Pet. App. 198a-204a. In that report, the Secretary addressed the ESRP's recommendations and concluded that he possessed sufficient information to perform his obligations under the OCSLA for review of the pending Manteo Unit plan of exploration. *Id.* at 202a. That certification by the Secretary removed the temporary restraint on approval of the Manteo Unit plan of exploration under the OBPA. The Secretary nonetheless voluntarily deferred further consideration of that plan until he completed two discrete environmental studies recommended by the ESRP. *Ibid.* Throughout this entire period, all activities on the proposed Manteo Unit were in any event barred by the objections of North Carolina to Mobil's CZMA certifications of its plan of exploration and NPDES application. 16 U.S.C. 1456(c)(3)(A)-(B); J.A. 106-112, 141-148.

13. After the Secretary submitted his April 1992 certification to Congress, the MMS sent a letter to the lessees of OCS leases on the Outer Banks that terminated the suspensions imposed on those leases in September 1990. J.A. 165-167. But petitioners then requested the MMS to *reinstate* the lease suspensions, pursuant to the MOU, so that petitioners could continue to pursue their administrative appeals of North Carolina's CZMA objections. J.A. 168-172. Petitioners stated that, while the mandates of the OBPA had "been fulfilled, the Manteo Unit partners are still awaiting a decision from the U.S. Department of Commerce on appeals from the State of North Carolina's Denials of Consistency Certification on the [Manteo Unit] Exploration Plan and the NPDES Permit. These appeals were filed respectively, in July 1990 and December 1990." J.A. 168. Because those proceedings have delayed any operations on

the Manteo Unit "over the past period of years," and because that delay "continues at present," petitioners asked for the lease suspensions to be continued in effect. *Id.* at 169. MMS granted petitioners' request for a further suspension of the leases. *Id.* at 172-174.

14. In July 1994, MMS released the two environmental studies that the Secretary voluntarily performed in connection with his review of the Manteo Unit plan of exploration. J.A. 194. At that time, however, the lease suspensions granted to Mobil pending a decision by the Secretary of Commerce on the State's objections to the plan of exploration and the discharge permit still remained in effect. Pending resolution of those proceedings, and pursuant to the lease suspensions issued at Mobil's request, no further action was taken by the Secretary on the proposed plan of exploration.

15. On September 2, 1994, the Secretary of Commerce issued decisions declining to override the objections of the State of North Carolina to the plan of exploration and the discharge permit that Mobil requested for the Manteo Unit. J.A. 196-336. The Secretary noted that the area in which petitioners sought to drill for oil and gas—"The Point" of the Outer Banks—is "unique" in its "physical and biological qualities." *Id.* at 207. Because of its location at the "convergence of the Gulf Stream, continental slope and shelf waters," there are concentrated masses of "nutrients, plankton and floating materials near the sea surface" that make "The Point [a] highly productive and ecologically unique area essential to the State's coastal zone." *Ibid.* The "anomalously high biomass" of this area makes it an "unusually abundant" environmental resource. *Ibid.* As a result, "the area serves as an important migratory pathway, feeding habitat and spawning ground for several commercially significant species." *Id.* at 225.

With respect to both the proposed discharge permit and the proposed plan of exploration, the Secretary concluded that there was inadequate information "to adequately assess the risk of adverse impacts" on these important environmental resources. J.A. 228, 304.[3] The Secretary found that the environmental hazards from these activities are particularly significant because of the location of the proposed drilling site at "one of the most productive offshore fishing grounds along the east coast." *Id.* at 243. The Secretary noted that available data suggested that the proposed exploration would "have adverse effects on the resources and uses of the State's coastal zone." *Id.* at 245. "Given that this is a frontier area and an area of rich natural resources upon which the State heavily depends," the Secretary concluded that "Mobil has not adequately documented the biological resources or ecological relationships at risk." *Ibid.* The Secretary further concluded that "the ecological relationship of the benthic environment to the State's fisheries must be further assessed in order to adequately evaluate the risks of impact of Mobil's proposed activities." *Id.* at 246.

16. After the Secretary of Commerce declined to override North Carolina's objections under the CZMA, the MMS informed Mobil that the lease suspensions that had been granted pending that decision were terminated. C.A. App. 534. Petitioners, however, promptly filed a suit in federal district court to challenge the determinations made by the Secretary of Commerce. *Mobil Oil Exploration* v. *Brown*, Civ. No. 95-93SSH (D.D.C.). They then requested "reinstatement of the suspensions" in order to complete their suit challenging the decisions upholding the State's

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[3] One of the specific concerns that supported the State's objections was that "Mobil's proposed wastes may either destroy or poison a food source for part of the State's demersal fishery resources." J.A. 231.

CZMA objections to the plan of exploration and the discharge permit. App., *infra*, 2a.

The MMS granted the suspension request, noting that the requested suspensions "are appropriate pursuant to 30 C.F.R. 250.10(b)(6) and the MOU while Mobil seeks judicial review of the Secretary's decision." App., *infra*, 5a. This lease suspension, which was issued at petitioners' request, remains in effect to this day.

17. In 1996, Congress repealed the OBPA. Pub. L. No. 104-134, Title I, Department of the Interior § 109, 110 Stat. 1321-177. Because the Secretary of Commerce declined to override North Carolina's objections to the plan of exploration and the discharge permit, petitioners were barred *both before the OBPA was enacted and after the OBPA was repealed*—as well as while the OBPA was in effect—from any action to implement the proposed Manteo Unit plan of exploration. 43 U.S.C. 1340(c)(2).

IV. *The Present Litigation*

18. In October 1992, more than two years after the OBPA was enacted and during the period that lease suspensions requested by Mobil were in effect, petitioners joined an action filed in the United States Court of Federal Claims in which they claimed that enactment of the OBPA in 1990 effected a material breach and an anticipatory repudiation of their leases.[4] The trial court awarded summary judgment to petitioners (Pet. App. 45a-99a) and entered a final judgment awarding them "restitution of their up-front [lease] payments" in a total amount exceeding $156 million. *Id.* at xa, 44a.

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[4] The action was commenced by Conoco, Inc., in May 1992. J.A. 1. Petitioners are the sole remaining plaintiffs in that action. The complaint included an allegation of a taking of property, which is not before the Court at this time.

19. The court of appeals reversed. Pet. App. 3a-24a. The court concluded that "there is no evidence of a breach of contract by the United States" and that "the lease agreement in this case has not been breached by either party." *Id.* at 18a-19a. "Rather, [petitioners have] been unable to obtain the necessary Government approvals that would allow [them] to go forward with exploration of the lease site, a problem for [petitioners] that arose in 1989, before the OBPA was enacted, and continued after the OBPA was repealed." *Ibid.* The court rejected petitioners' argument that the OBPA was "a supervening act" that made performance impossible. *Id.* at 19a. The court noted that the "OBPA was not the cause of [petitioners'] inability to obtain issuance of the required permits and approvals for its proposed oil exploration." *Ibid.* Although the lessees paid a substantial up-front cash bonus and annual rents in exchange for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources" (*id.* at 13a), that right "was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open." *Ibid.*

The court of appeals further explained that "[w]hatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the [plan of exploration's] CZMA consistency certification or the override provided by law." Pet. App. 14a. The court observed that "North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA * * *; North Carolina maintained [its] * * * objections throughout the time that the moratorium imposed

by the OBPA was effective." *Ibid.* The court concluded that "[u]nder the circumstances of this case, to treat [petitioners'] failure to obtain the necessary approvals and permits for exploratory activity as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters." *Id.* at 15a.

The court of appeals also found unconvincing petitioners' contention that, "even if their leases are subject to state objection over the CZMA consistency certification, the OCSLA provides for cancellation of the leases and restitution in such a situation." Pet. App. 16a. The court explained that "[t]he lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease." *Id.* at 18a.[5]

Judge Newman dissented. Pet. App. 19a-24a. In Judge Newman's view, petitioners had an "entitlement" under their leases to explore the tracts in question that "was negated when the government refused to issue the requisite permits, barring all exploration." *Id.* at 20a. Judge Newman reasoned that the United States breached the leases by refusing "to override North Carolina's objection, although it had that right by statute." *Ibid.*[6]

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[5] Because the court of appeals reversed the trial court's finding of liability, the court did not address the challenges raised by the government to the manner in which the lower court calculated the amount of restitution.

[6] In response to a petition for rehearing, Judge Newman revised her original dissent, in which she had concluded that "the United States did not breach this contract." Pet. App. 43a. In her original dissent, she had reasoned that restitution was nonetheless permissible on the theory that "the contract was voided without the fault of either party" because it had been "made impossible of performance * * * due to the continuing intervention of the State of North Carolina." *Ibid.*

V. *The Pending CZMA Litigation*

20. The suit filed by petitioners to challenge the decision of the Secretary of Commerce declining to override the State's CZMA objections to the Manteo Unit is still pending in federal district court. The court stayed those proceedings after petitioner sought to supplement the administrative record in 1996 to add with studies "submitted more than two years after the comment period closed." 920 F. Supp. 1, 2 (D.D.C. 1996). The court concluded that the Secretary of Commerce should decide whether to reopen the record and that, "[i]f the Secretary decides against reopening the [record], the Court will lift the stay." *Id.* at 3.

The Secretary of Commerce advised the parties on December 8, 1999, that he declined to reopen the record to admit the two new studies. In doing so, the Secretary emphasized that, "even were I to reopen the record to admit the two studies and reconsider my decision, I would still lack sufficient information to override North Carolina's objections." App., *infra*, 8a.[7]

The federal district court proceedings commenced by Mobil are thus still pending, and the lease suspensions requested by Mobil therefore remain fully in effect. See page 17, *supra*.

SUMMARY OF ARGUMENT

I. Petitioners seek rescission and restitution for a purported breach and repudiation of their leases which they assert occurred through the enactment and implementation of the OBPA. There is no dispute among the parties that

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[7] The Secretary of Commerce stated that he "continue[d] to encourage Mobil, North Carolina and other interested parties to work toward resolution of North Carolina's need for additional scientific information about the impacts of Mobil's proposed projects on its coast resources." App., *infra*, 8a-9a.

this case is governed by the general principles of contract law incorporated as federal common law under the decisions of this Court.

The standards for rescission and restitution under the federal common law of contracts are most stringent. A contract claimant may obtain rescission and restitution only by establishing that there has been a material or total breach that defeats the essential object or purpose of the contract. Similarly, only a repudiation of an essential element of the contract can justify rescission and restitution. A failure to perform that is not a material breach of the contract, or that does not defeat an essential object of the agreement, may merit an award of provable damages, but it does not justify rescission and restitution.

Even when a material breach or repudiation of the central object of the contract occurs, rescission and restitution do not automatically follow. The party who seeks such relief must unequivocally manifest his intention to rescind the contract within a reasonable time. If the non-breaching party continues to treat the contract as binding after the purported breach or repudiation, and continues to seek performance from the allegedly breaching party, he may not subsequently claim that the breach was material and may not then obtain restitution. In that situation, the claimant is limited to a recovery of such damages as are proven to result from the partial breach.

II. The standards governing rescission and restitution are not satisfied by petitioners in the circumstances of this case. The OBPA did not effect a material breach or repudiation of the cental object of the lease agreements. Indeed, as the court of appeals correctly held, that Act did not result in *any* breach of contract by the United States (Pet. App. 19a).

The OBPA did not impose any new substantive requirements or conditions upon petitioners. That Act suspended

the Secretary's approval of lease operations offshore of North Carolina for the specific purpose of ensuring that the Secretary was adequately implementing other, preexisting environmental legislation to which such leases are expressly subject. These leases, and the statutes and regulations to which the leases are subject, authorize lease suspensions and administrative delays so that environmental studies may be conducted. Delays of that nature are expressly contemplated and provided for by the parties' agreements and thus do not represent a material breach or repudiation of the leases.

Far from defeating the central object of the leases, the OBPA in fact imposed *no* delay on the parties' performance beyond that already occurring under the express terms of the leases. Petitioners' ability to undertake exploration activities under their leases was at all times—before enactment of the OBPA, while it was in effect, and after its repeal—barred by North Carolina's objections under the CZMA. If the OBPA had never been enacted, petitioners would have thus experienced precisely the same delay in proceeding with their proposed operations.

III. Presumably recognizing that fact, petitioners did not treat their leases as materially breached or repudiated when the OBPA was enacted in 1990. Instead, they did just the opposite. They treated the leases as continuing in effect and repeatedly demanded contract performance by the United States by (i) submitting a proposed plan of exploration, (ii) contesting the objections of the State of North Carolina to the plan of exploration and the associated discharge permit in proceedings conducted before the Secretary of Commerce under the CZMA and (iii) requesting and obtaining suspensions of their lease obligations so that they could conduct those continuing proceedings. Through these actions, petitioners made an affirmative election to continue the contract in effect and thereby waived any claim of rescission based

upon the alleged breach or repudiation of the leases occurring through enactment of the OBPA.

IV. Petitioners have separately requested and received all of the relief to which they may be entitled. Even if a technical breach of the lease agreements occurred, which we dispute, petitioners would be limited to such damages as could be proved from any delay imposed by the OBPA. No such delay occurred, and no such damages exist. Instead, at petitioners' repeated requests, and for reasons unrelated to the OBPA, petitioners' leases were extended for a period of time that began *before* the OBPA was enacted and that continues to this date, long *after* the OBPA has been repealed. Throughout this period, petitioners' leases have been continuously extended, and petitioners have been relieved of any obligation to make lease rental payments. At petitioners' request, these lease suspensions still remain in effect and will not expire until petitioners' challenge to the State of North Carolina's objections to the Manteo Unit exploration plan are finally resolved in other litigation now pending in federal district court. The court of appeals correctly concluded that petitioners' continuing failure to satisfy North Carolina's CZMA objections is "not attributable to" the United States and "does not create an entitlement to any refund of the consideration paid to obtain the lease." Pet. App. 18a.

ARGUMENT

I. GENERAL STANDARDS GOVERNING RESTITUTION APPLY TO THIS CASE

Although the background of this case involves a complex statutory and regulatory scheme governing the offshore leasing of federal lands, resolution of the parties' dispute turns on the application of basic principles of contract law. Petitioners seek rescission and restitution for a purported breach and repudiation of leases that allegedly resulted from

the enactment and implementation of the OBPA. The contractual issues to be resolved in this case are questions of federal common law that are "not controlled by the law of any State." *United States* v. *Allegheny County*, 322 U.S. 174, 183 (1944).

A. Standards For Recovery Of Restitution For Material Breach

It is well established that "[n]ot every departure from the literal terms of a contract is sufficient to be deemed a material breach" that would justify rescission and restitution. *Stone Forest Indus., Inc.* v. *United States*, 973 F.2d 1548, 1550-1551 (Fed. Cir. 1992). Under the federal common law of contracts, a contract claimant may obtain rescission and restitution for breach of contract only by demonstrating a material or total breach that goes to the essence of the contract and defeats its essential object and purpose. *Everett Plywood Corp.* v. *United States*, 512 F.2d 1082, 1093-1094 (Ct. Cl. 1975) (restitution improper when the breach "neither defeated the whole purpose of the contract nor deprived plaintiff of substantially all that it had bargained for"); *Rudd Paint & Varnish Co.* v. *White*, 403 F.2d 289, 291 (10th Cir. 1968) (rescission and restitution appropriate only when a breach is "substantial"); *Neenan* v. *Otis Elevator Co.*, 180 F. 997, 1000-1001 (S.D.N.Y. 1910) (rescission and restitution appropriate only when the breach or default "goes to the substance of the contract"), aff'd, 194 F. 414 (2d Cir. 1912). "Restitution is an available remedy for breach of contract only when the breach is of such vital importance and so material that it is held to go to the 'essence' of the contract." *United States* v. *Western. Cas. & Sur. Co.*, 498 F.2d 335, 339-340 (9th Cir. 1974) (citing 5 *Corbin on Contracts* § 1104, at 562 (1964)). See also John D. Calamari & Joseph M. Perillo, *Contracts* § 15-3, at 649 (3d ed. 1987); 1 George E. Palmer, *The Law of Restitution* § 4.7, at 427 (1978).

Whether, for this purpose, a contract has been materially breached turns on "the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties." *Stone Forest Indus., Inc.* v. *United States*, 973 F.2d at 1551.[8] Among the factors considered in determining whether a breach is material is an assessment of the "object of the parties in making the agreement" (*Federal Land Bank of Wichita* v. *Krug*, 856 P.2d 111, 115 (Kan. 1993)), "the purpose of the contract" (*Gibbs* v. *G.K.H., Inc.*, 427 S.E.2d 701, 702 (S.C. Ct. App. 1993)), and whether the claimant has been denied the "major benefit" of the exchange (*Thomas* v. *HUD*, 124 F.3d 1439, 1442 (Fed. Cir. 1997)). A material breach is one that defeats both the purpose and object of the contract and that renders performance "substantially different from what was contracted for." *Callanan* v. *Powers*, 92 N.E. 747, 752 (N.Y. 1910). "A breach which goes to only a part of the consideration, is incidental and subordinate to the main purpose of the contract, and may be compensated in damages does not warrant a rescission of the contract." *Eliker* v. *Chief Indus.*, 498 N.W.2d 564, 566-567 (Neb. 1993) (quoting *Klapka* v. *Shrauger*, 281 N.W. 612, 616 (Neb. 1938)).

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[8] As Professor Corbin has noted, whether a breach is described as a total or partial breach turns on "a careful weighing of the importance of the facts and events before it, a reasonable interpretation of the expressions of the parties, a consideration of existing doctrines and antecedent cases, and a determination of what public welfare and sound policy require." 4 *Corbin on Contracts*, *supra*, § 946, at 812. "In one sense, there is never such a thing as an immaterial breach. For any breach of contract, an action lies; any breach is material enough for that, although if no substantial injury is shown the damages recoverable are only nominal. But not infrequently the term material breach is used to mean one that the injured party can elect to treat as a total breach." *Id.* at 813. A judgment about whether a breach is "material" for this purpose is thus implicitly a judgment about whether restitution is an appropriate remedy. *Id.* at 812 (the label "stat[es] the result").

The applicable test is whether the breach is so substantial that it "go[es] to the root of the agreement" and defeats the parties' object in making the contract. *Frank Felix Assocs., Ltd.* v. *Austin Drugs, Inc*, 111 F.3d 284, 289 (2d Cir. 1997) (citations omitted).

Even when a material breach occurs, the non-breaching party is not automatically entitled to rescission and restitution, for he must take "affirmative steps" to "manifest his intention to rescind within a reasonable time." *Graham* v. *James*, 144 F.3d 229, 237-238 (2d Cir. 1998). If the non-breaching party continues to treat the contract as binding and continues to demand performance from the other party after a breach occurs, he may not subsequently claim the breach was material and obtain restitution. Instead, the claimant is then limited to such provable damages as occurred from the partial breach. See, *e.g.*, *Cities Serv. Helex, Inc.* v. *United States*, 543 F.2d 1306, 1313 (Ct. Cl. 1976); *Everett Plywood Corp.* v. *United States*, 512 F.2d at 1093.

B. Standards For Recovery Of Restitution For Repudiation

Similar rules apply when the claim of restitution is based on an alleged repudiation of the contract. A refusal to perform an incidental obligation does not warrant rescission of the contract. To justify rescission and restitution, the repudiation must be so material that it defeats the essential object of the parties in making the contract. *City of Fairfax* v. *Washington Metro. Area Transit Auth.*, 582 F.2d 1321, 1327-1331 (4th Cir. 1978), cert. denied, 440 U.S. 914 (1979); *Fredonia Broad. Corp.* v. *RCA Corp.*, 481 F.2d 781, 794 (5th Cir. 1973). The repudiation must be a "'refusal to perform * * * of the whole contract or of a covenant going to the whole consideration.'" *City of Fairfax* v. *Washington Metro. Area Transit Auth.*, 582 F.2d at 1327 (quoting *Kimel*

v. *Missouri State Life Ins. Co.*, 71 F.2d 921, 923 (10th Cir. 1923)). Accord, *Campos* v. *Olson*, 241 F.2d 661, 662-663 (9th Cir. 1957). "[T]he obligation repudiated must be so essential to the purpose of the contract that non-performance makes the agreement worthless." *United Corp.* v. *Reed, Wible and Brown, Inc.*, 626 F. Supp. 1255, 1257 (D. V.I. 1986). To warrant restitution, a repudiation "cannot consist of a mere partial breach; nor can it be based on mere delay unless the contract makes time of the very essence." *City of Fairfax* v. *Washington Metro. Area Trans. Auth.*, 582 F.2d at 1327 (footnotes omitted).

The repudiation must also reflect a "distinct and unequivocal absolute refusal to perform, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end." *Smoot's Case*, 82 U.S. (15 Wall.) 36, 48 (1872). See also *Dingley* v. *Oler*, 117 U.S. 490, 503 (1886); *Tretchick* v. *Department of Transp.*, 109 F.3d 749, 752 (Fed. Cir. 1997) (anticipatory repudiation must be an absolute, unqualified communication of refusal to perform); *United States* v. *Dekonty Corp.*, 922 F.2d 826, 827-828 (Fed. Cir. 1991); *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988).

As with claims for rescission based upon an alleged material breach, a claim for rescission based upon a repudiation of the contract may not be pursued if the claimant did not treat the contract as at an end but instead continued to seek compliance with it. "On the heels of [a] repudiation [the non-repudiating party] had two options: (1) it could have stopped performance and sued for total breach; or (2) it could have affirmed the contract by continuing to perform while suing in partial breach." *ARP Films, Inc.* v. *Marvel Entertainment Group, Inc.*, 952 F.2d 643, 649 (2d Cir. 1991). Actions taken by the non-breaching party to seek or demand

performance by the other party after the purported repudiation are "tantamount to an election to affirm the contract." *Ibid.*, citing, *e.g.*, *Cities Service Helex, Inc.* v. *United States*, 543 F.2d at 1313-1314.

For petitioners to prevail in this case, they therefore must establish that a delay occurring from the operation of the OBPA (i) effected a material breach of the leases that defeated their essential object or (ii) constituted an unequivocal and absolute refusal to perform and a repudiation of the central or "root purpose" of the lease agreements. Even if such a material breach or repudiation were established, petitioners would then also be required to establish that they in fact treated the leases as at an end and did not continue to seek or demand performance under the leases by the United States.

II. THE OBPA DID NOT MATERIALLY BREACH OR REPUDIATE PETITIONERS' LEASES

The court of appeals correctly concluded that petitioners cannot satisfy these prerequisites of restitution. As the court explained, the enactment and implementation of the OBPA did not effect a breach of the leases at all, much less a material breach. Pet. App. 18a-19a.[9] The OBPA did not impose any new *substantive* requirements or conditions upon petitioners or the Secretary. That statute required the Secretary of the Interior to ensure that he was conducting a realistic review of the environmental issues that were framed under the preexisting legislative scheme (NEPA, CZMA, and OCSLA) to which these leases were expressly

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[9] *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), on which petitioners seek to rely, is fundamentally inapposite because, as the court of appeals correctly held, "there is no evidence of a breach of contract by the United States" in this case. Pet. App. 19a. The Court's decision in *Winstar*, moreover, does not address, and is not inconsistent with, any of the established legal prerequisites of restitution discussed in this brief.

subject. A temporary suspension of lease operations to permit such environmental investigations to be conducted is specifically authorized by the terms of the leases and by the regulations to which the leases are subject. Because a delay of that nature is expressly authorized under the leases, it did not constitute a material breach or repudiation of the leases.

A. *The Enactment And Implementation Of The OBPA Did Not Breach Petitioners' Leases*

1. Prior to enactment of the OBPA, petitioners had tentatively proposed to drill an exploratory well in an area of the Outer Banks that is "[o]ne of the East Coast's most important commercial and recreation fisheries" and is "characterized by unique physical and biological qualities." J.A. 207. The proposal to drill in this "ecologically unique area" (*ibid.*) created especially sensitive environmental concerns for the Outer Banks and for the State of North Carolina—concerns that had not been alleviated by earlier environmental reports prepared by MMS. *Id.* at 61-75.[10]

In enacting the OBPA, Congress found that the oceanographic characteristics of the Outer Banks were complex and not well documented, that little was understood about the unique ecology of that area, and that prior studies had not addressed and resolved the significant environmental questions posed by development in this sensitive offshore zone. OBPA § 6003(b), 104 Stat. 555-556. The Act therefore

[10] In 1994, the Secretary of Commerce declined to override North Carolina's objection to the drilling proposal under the CZMA and concluded that petitioners had failed adequately to address the environmental harms threatened by their proposed development of the Outer Banks leases. J.A. 245-246; see pages 16-17, *supra*. Instead of providing the data and related information that had been requested by the State, Mobil pursued a course of litigation—challenging the determinations of the State and the Secretary of Commerce in a district court proceeding that is still pending. See pages 20-21, *supra*.

directed the Secretary not to approve further leases or lease operations in the Outer Banks until he was able to certify that he possessed sufficient information to discharge his preexisting environmental responsibilities under the OCSLA. A panel of knowledgeable experts—the ESRP—was created to provide information and recommendations to assist the Secretary in making that certification. See page 12, *supra*. The Secretary was not required to accept any recommendations made by that panel. Instead, after the Secretary certified in 1992 that he possessed sufficient environmental information to discharge his responsibilities under the OCSLA, his authority to approve or disapprove proposed operations under the OCSLA was unaffected by the OBPA. OBPA § 6003(c)-(e), 104 Stat. at 556-558. See pages 14-15, *supra*.

Any temporary delay in the approval of lease operations that could have resulted before the Secretary certified his readiness to perform his OCSLA responsibilities was precisely the type of delay contemplated and authorized by the parties under these leases. By incorporating the provisions of the OCSLA and other applicable statutes and regulations, the leases authorize the suspension of "any operation or activity" when appropriate "*in the national interest*" or "if there is a *threat of serious, irreparable, or immediate harm or damage to* life (including *fish and other aquatic life*), to property, to any mineral deposits (in areas leased or unleased), *or to the marine, coastal, or human environment* * * * ." 43 U.S.C. 1334(a)(1)(A)-(B) (emphasis added). Lease suspensions of this type "merely put the leases on hold, extend[] their terms, and suspend[] rental payment obligations." C.A. App. 128.3.

This contractual authority to suspend lease operations when environmental harm is threatened or when dictated by

the "national interest" applies directly here.[11] The Conference Report on the OBPA notes that any delay resulting from the performance of the required environmental analysis is "related to a legitimate and broad-based public purpose—environmental protection" and to the need "for the collection and analysis of crucial oceanographic, ecological, and socioeconomic data." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 163 (1990). The Conferees concluded that such environmental investigation is "a reasonable action to prevent a public harm that could result from the lack of such information." *Ibid.*

By incorporating the regulations issued under the OCSLA, the leases also authorize suspension when "necessary for the implementation of the requirements of the National Environmental Policy Act or *to conduct an environmental analysis.*" 30 C.F.R. 250.110(b)(4) (emphasis added) (formerly codified at 30 C.F.R. 250.10(b)(4) (1997)). That suspension provision applies precisely to the OBPA, which by its terms directed the Secretary to "conduct an environmental analysis" to ensure that he was properly able to perform his duties under the OCSLA. OBPA § 6003(c)-(e), 104 Stat. at 556-557.

The fact that it was *Congress* that directed the Secretary to perform this environmental analysis—and that the Secretary did not initially undertake this review on his own initiative—does not make the suspension provision inapplicable. This Court has emphasized that it is not a breach of contract for Congress to mandate specific action that was otherwise left to the discretion of the Secretary under a federal lease. *North American Commercial Co.* v.

[11] The 30-day review procedure established for plans of exploration under 43 U.S.C. 1340(c)(1) is similarly subject to deferral whenever the Secretary "believes a suspension of activities on the lease is warranted." H.R. Rep. No. 590, *supra*, at 49.

United States, 171 U.S. 110, 134 (1898). The United States is "the real contracting party," and the Secretary is merely its agent. *Ibid.* Under the applicable statutes and regulations, the United States was entitled to require a suspension of the leases to "conduct an environmental analysis" and thereby determine whether the preexisting environmental requirements applicable to those leases were being met.[12] That is precisely what Congress directed in enacting the OBPA: as the Conferees emphasized, because the leases incorporate the suspension regulations, "the lease terms of all affected OCS tracts will be extended" rent-free during the period that the required environmental determinations are being made and "the interests of the lessees [therefore] will not be adversely affected to achieve the legitimate purposes of this section." H.R. Conf. Rep. No. 653, *supra*, at 163.[13]

[12] In addition, 30 C.F.R. 250.110(b)(6) permits suspension of OCS leases, at the direction of the United States or at the request of the lessee, to allow for inordinate delays encountered by lessees in obtaining required permits or consents. This regulation permits suspension "because of governmental delays beyond the control of the lessee." 47 Fed. Reg. 30,055 (1982).

[13] Petitioners incorrectly imply (Mobil Br. 5-7; Marathon Br. 10-11) that the legislative history of the OBPA demonstrates an intent by Congress to accomplish an open-ended ban on exploration. Petitioners' description of the contents of the "legislative record" is inaccurate. In particular, the cited letters from Congressman Walter Jones and Governor James Martin of North Carolina to President Bush concerning lease operations on the Outer Banks (J.A. 102-105) are not part of the Congressional Record and do not address or explain the scope or purpose of the OBPA. None of the remarks cited by petitioners that actually *are* part of the legislative history of the Act conflict with the clear statement of the Conference Report that the Act merely imposed a "temporary delay in the approval of activities on existing leases offshore North Carolina" for which the leases would be "extended" and which would therefore not "adversely affect" the interests of the lessees. H.R. Conf. Rep. No. 653, *supra*, at 163. As Mobil concedes (Mobil Br. 6), when Congressman Jones

2. The requirement that the Secretary certify to Congress that he possessed sufficient information to comply with his responsibilities under OCSLA before approving further lease operations under that statute (OBPA § 6003(c)(3), 104 Stat. 556) did not alter petitioners' rights under the leases. All operations conducted under OCS leases are subject to compliance with the requirements of OCSLA, NEPA and the CZMA. See pages 5-7, *supra*. If the Secretary did not possess sufficient information to comply with his responsibilities under those statutes, he would not be able to authorize any lease operations. The OBPA did not add any new substantive requirements to those preexisting statutory conditions upon lease operations. See pages 12-13, supra. After completing the required environmental inquiries, the Secretary was authorized to approve exploration and development of OCS leases on the Outer Banks under the same legal criteria that applied prior to enactment of the OBPA. See pages 14-15, *supra*.

In 1992, the Secretary certified to Congress that he possessed sufficient information to carry out his responsibilities under the OCSLA for review of the Manteo Unit exploration plan. Pet. App. 198a.[14] At that time, however, the Secretary

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had previously sought an actual ban on exploration offshore of North Carolina, the House of Representatives rejected the request.

[14] Petitioners incorrectly assign importance to the fact that the Secretary's certification did not expressly address any subsequent or alternative exploration or development activities petitioners might want to perform. See Mobil Br. 8-9, 21, 24 n.21; Marathon Br. 15, 29. It is not surprising that the Secretary's certification specifically addressed only the Manteo Unit plan of exploration, for the Secretary had no other proposals for exploration or development before him. He obviously could not certify that he possessed sufficient information to carry out his responsibilities under the OCSLA regarding *other* activities that petitioners might hypothetically wish to perform at some future time. If other activities were proposed in the future, they could not, under the terms of the leases, be approved unless the Secretary had sufficient information to make the

decided, on his own initiative, to defer approval of the proposed Manteo Unit plan of exploration until two specific environmental studies recommended by the ESRP were completed.[15] Pet. App. 202a. The Secretary's determination to conduct those *additional* "environmental analyses" was authorized by the leases (see page 32, *supra*); it was not a requirement imposed by the OBPA. See note 15, *supra*.[16] The lessees acknowledged that their leases authorized a suspension for the performance of such environmental studies by requesting a renewal of their lease suspensions at that time. J.A. 168-174.

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environmental determinations required under the preexisting applicable statutes. See pages 5-7, *supra*. The OBPA did not alter that fact.

[15] Under the OBPA, the Secretary was not required to adopt any of the environmental study recommendations of the ESRP. See H.R. Conf. Rep. No. 653, *supra*, at 162.

[16] Mobil errs in asserting that the Secretary refused to permit exploration of the Manteo Unit until completion of "all of the studies recommended by the Panel." Mobil Br. 8. In fact, the Secretary stated that he would pursue only two of the studies recommended by the ESRP. Contrary to petitioners' contention (Mobil Br. 8-9; Marathon Br. 15-16), the Secretary did not suggest that any future exploration proposals would be delayed for the performance of additional studies recommended by the ESRP. The Secretary instead stated that environmental information would "be evaluated after the results are available from the first exploratory well" and that the need for additional studies would be addressed as "a part of th[e] environmental assessment process" required under the OCSLA before development operations could commence. Pet. App. 202a. See 43 U.S.C. 1351(e)-(f).

Mobil incorrectly suggests that the ESRP "determined that additional studies would be required before deciding whether to permit *any* of these additional wells." Mobil Br. 9. The ESRP was plainly not empowered to rule upon anything; it merely performed an analysis and issued a report making recommendations. OBPA § 6003(3), 104 Stat. 557. The Secretary was vested with the responsibility and authority under the OCSLA to decide whether to approve any proposed activities, and the OBPA did not change that. 43 U.S.C. 1340(c).

B. *The OBPA Did Not Deprive Petitioners Of The Central Object Of The Leases Or Constitute A Refusal To Perform Them As A Whole*

The OBPA did not defeat the central object of the leases. In fact, that Act imposed no delay on the performance of the parties beyond that already authorized and occurring under the express terms of the leases. Petitioners' ability to undertake exploration activities under these leases was at all times—both before enactment of the OBPA and after its repeal—blocked by North Carolina's objections under the CZMA. See pages 14-15, *supra*. Even if the OBPA had never been enacted, petitioners would thus have experienced precisely the same delay in proceeding with the proposed operations. As the court of appeals stated, petitioners' "failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective" (Pet. App. 15a).

1. The sole aspect of performance that petitioners claim was impeded during the temporary delay assertedly imposed by the OBPA was the right to have an "approvable" plan of exploration accepted by the Secretary within 30 days of its submission. 43 U.S.C. 1340(c)(1). But petitioners offer no plausible basis for asserting that the 30-day period assigned for this particular administrative step goes to the "essence" of the parties' agreement. It is, in fact, abundantly clear that it does not.

The "essence" of the parties' agreement was for petitioners to obtain a first priority on any right to seek access to offshore minerals for exploration and development. That right "was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies." Pet. App. 13a. Approval of an exploration plan is only one among many express preconditions to the exploration and

development of an OCS lease. Even when the Secretary has approved an exploration plan, no activities may occur pursuant to the plan when (as in this case) the lessee has not achieved compliance with the Coastal Zone Managment Plan of the affected State. 16 U.S.C. 1456(c)(3)(B); 43 U.S.C. 1340(c)(2). And when, as in this case, the plan of exploration contemplates the discharge of wastes into the ocean, no exploration activities may occur until the lessee obtains an NPDES permit from EPA—a requirement that is independently subject to the CZMA certification process that petitioners have failed to satisfy. 16 U.S.C. 1456(c)(3)(A)-(B); 33 U.S.C. 1311(a), 1342(a). Moreover, even if CZMA compliance were at some point obtained, exploration still could not occur until the lessee obtains a drilling permit—which is an approval procedure for which no specific time limit applies. See 43 U.S.C. 1340(d); 30 C.F.R. 250.414.

The legislative history of the OCSLA confirms that the 30-day approval procedure for exploration plans does not function as the "essence" of these agreements. The Conference Report notes that the Secretary may delay approval of any proposed exploration plan *beyond* the 30-day period whenever "he believes a suspension of activities on the lease is warranted." H.R. Rep. No. 590, *supra*, at 49.[17] The legislative history is thus consistent with the general rule of construction that a statute establishing a time period for

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[17] Since the Secretary deferred action on the exploration plan until required environmental analyses were conducted, for which a suspension of activities was warranted under the applicable regulations, and since the further suspensions requested by petitioners continue in effect even to this day, the period in which the exploration plan is to be approved under 43 U.S.C. 1340(c)(1) has not even yet commenced to run. See pages 15, 17, *supra*. Petitioners are thus not only wrong in stating that a material breach occurred; they are wrong in stating that any breach at all has occurred. Pet. App. 19a.

governmental action is not mandatory in the absence of express language that specifies a consequence for a failure to comply. See *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 62-65 (1993) ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction"); *Canadian Fur Trappers Corp.* v. *United States*, 884 F.2d 563, 566 (Fed. Cir. 1989).[18] The "coercive sanction" sought by petitioners in this case—rescission and restitution of the lease for an asserted "noncompliance with statutory timing provisions" (but see note 17, *supra*)—is thus not justified by principles either of contract law or of statutory construction.

In light of the inherently complex and lengthy processes involved in the administration of OCS leases, the asserted failure to obtain compliance with this one, specific 30-day approval period was not "of such vital importance" that it deprived petitioners of "the 'essence' of the contract." *United States* v. *Western Cas. & Sur. Co.*, 498 F.2d at 339. See also *City of Fairfax* v. *Washington Metro. Area Transit Auth.*, 582 F.2d at 1327 (rescission cannot "be based on mere delay" of a performance that the contract has not expressly made "of the very essence"); pages 26-27, *supra*.

2. In concluding that no material breach of contract resulted from enactment of the OBPA, the court of appeals properly took into account the fact that the Secretary "could not have issued any permits for exploration so long as North Carolina's [CZMA] objections remained in force" and that petitioners' "failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective." Pet. App. 15a.

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[18] See also *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-719 (1990); *Brock* v. *Pierce County*, 476 U.S. 253 (1986).

Petitioners assert (Mobil Br. 29-30; Marathon Br. 39-42) that this concurrent prohibition of lease operations under the CZMA is irrelevant because an award of restitution is not premised on proof from the non-breaching party that it would have been able to perform its side of the bargain. See *Ankeny* v. *Clark*, 148 U.S. 345, 353 (1893). But the issue in this case is not whether petitioners could, in fact, ultimately achieve performance under the contract:[19] it is whether an asserted *delay* resulting from the OBPA "defeated the whole purpose of the contract" and thereby justifies rescission and restitution. *Everett Plywood Corp.* v. *United States*, 512 F.2d at 1093-1094; see pages 27-29, *supra*. The court of appeals correctly reasoned that the asserted delay resulting from the OBPA was, in fact, inconsequential to the essential rights existing under the leases and that rescission and restitution is therefore not justified. Pet. App. 13a. As the court stated, the asserted delay "had no effect upon these OCS leases"—and therefore was not a material breach—because exploration was concurrently stalled in any event due to petitioners' ongoing failure to achieve compliance with the requirements of the CZMA that were expressly incorporated into the leases. *Id.* at 14a.[20]

III. PETITIONERS WAIVED ANY CLAIM FOR MATERIAL BREACH OR REPUDIATION

Petitioners did not treat these leases as materially breached or repudiated when the OBPA was enacted in

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[19] Indeed, since petitoners' leases remain in effect, they may still be able to perform under them. That is, presumably, the reason that petitioners have continued to pursue their litigation challenging the CZMA objections of the State of North Carolina.

[20] One of the five leases at issue in this case (see page 8, *supra*) was not part of the Manteo Unit and has never been encompassed within a proposed plan of exploration. The OBPA obviously did not limit any operations under that lease, since none have ever been proposed.

1990. They did just the opposite. They treated the leases as continuing in effect and repeatedly demanded various different types of contract performance by the United States. In particular, after the asserted breach, petitioners (i) submitted a proposed plan of exploration under the leases, (ii) contested the objections of the State of North Carolina to the plan of exploration and to the associated NPDES discharge permit in proceedings under the CZMA conducted first before the Secretary of Commerce and ultimately in federal district court, and (iii) requested and obtained numerous suspensions of lease operations so that they could pursue their continuing efforts to demand and achieve performance under the leases. See pages 15 and 17, *supra*; note 12, *supra*.

Such actions seeking contractual performance after the asserted material breach has occurred are "tantamount to an election to affirm the contract." *ARP Films, Inc.* v. *Marvel Entertainment Group, Inc.*, 952 F.2d at 649. Even when a material breach or repudiation occurs, there is no automatic right of rescission and restitution. Instead, a material breach gives the non-breaching party the right to elect whether to treat the contract as at an end or to continue it. *Cities Serv. Helex, Inc.* v. *United States*, 543 F.2d at 1313; see pages 30, 32, *supra*. If the non-breaching party decides to treat the contract as at an end, *both* parties are relieved from further performance. If the non-breaching party instead demands further performance under the contract and thereby elects to continue it in effect, *both* parties remain obligated to it.[21] In that situation, the non-breaching

[21] If a party "does what amounts to recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or permits the other party to deal with the subject matter under the belief that the transaction has been recognized, or abstains for a considerable length of time from impeaching it, so that the other is reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, though it be originally impeachable, becomes unimpeachable." *Union Pac. R.R.* v. *United States*, 847 F.2d 1567, 1570 (Fed. Cir. 1988) (quoting *Harvey Radio Labs. Inc.* v. *United States*, 115 F. Supp. 444, 448-449 (Ct. Cl. 1953)).

party has waived the claim for rescission and retains only a claim of damages for partial breach.[22] *Ibid.* See also *Dingley* v. *Oler*, 117 U.S. at 501-504; *Smoot's Case*, 82 U.S. (15 Wall.) at 47-48.

Action taken by the non-breaching party to compel contract performance after a material breach has occurred is the antithesis of the acceptance of a repudiation; it is instead an election to continue performance under the contract. *Cities Serv. Helex, Inc.* v. *United States*, 543 F.2d at 1316; see also *Phillips Petroleum Co.*, 225 Ct. Cl. at 578.[23] Such actions are inconsistent with a claim for rescission because, by not treating the contract as at an end and thereby discharging the breaching party of any further obligation under the contract, they deprive that party of the opportunity to save the expense of additional performance. *Ling-Temco-Vought, Inc.* v. *United States*, 475 F.2d at 638, 639 n.5.

For more than two years after the OBPA was enacted, petitioners did not suggest or announce that the leases would be treated as at an end. Instead, both before and after filing this suit in 1992, they continued to demand and obtain a variety of different types of contract performance from the

[22] See also *Phillips Petroleum Co.* v. *United States*, 225 Ct. Cl. 575, 578-579 (1980); *Pinewood Realty Ltd. Partnership* v. *United States*, 617 F.2d 211, 215 (Ct. Cl. 1980); *Airco, Inc.* v. *United States*, 504 F.2d 1133, 1135-1137 (Ct. Cl. 1974); *Ling-Temco-Vought, Inc.* v. *United States*, 475 F.2d 630, 635-639 (Ct. Cl. 1973).

[23] An exchange of correspondence that requests or offers contract performance has been held to constitute a sufficient election to foreclose a claim of material breach or repudiation. See *Dingley* v. *Oler*, 117 U.S. at 503; *Airco, Inc.* v. *United States*, 504 F.2d at 1135-1137.

United States. For example, in submitting a proposed plan of exploration after the OBPA was enacted, Mobil sought to require the Secretary to take affirmative action under the leases and expend resources in doing so. J.A. 115. Nothing in the submission of that proposed plan of exploration communicated to the United States that petitioners were electing to treat the leases as terminated; instead, petitioners were urging continued performance under the leases. *Ibid.* Having thus continued to "urge or demand a compliance with the contract," petitioners cannot now contend that they instead "underst[oo]d it to be at an end." *Smoot's Case*, 82 U.S. (15 Wall.) at 47-48; *Dingley* v. *Oler*, 117 U.S. at 501-504 (same); see also *Union Pac. R.R.* v. *United States*, 847 F.2d 1567, 1570 (Fed. Cir. 1988).[24]

After the alleged material breach of contract, petitioners also affirmatively treated the leases as in effect by pursuing administrative proceedings before the Secretary of Commerce seeking to overturn North Carolina's objections to the plan of exploration under the CZMA. In doing so, petitioners required the expenditure of resources by the Department of Commerce, the Department of the Interior, and the 12 other federal agencies that took part in the administrative proceedings. J.A. 196, 211, 261, 277. Moreover, even after petitioners commenced the present suit for restitution, they have continued to seek enforcement of their lease rights (i) by pursuing their challenge to the State's CZMA objection into federal district court and (ii) by seeking and obtaining extensions of their leases to permit

[24] If a party continues to insist on performance, and fails to declare a contract terminated, after an essential aspect of performance has not occurred in a timely manner, he may not thereafter contend that time was "of the essence" in the performance of that obligation. *Pinewood Realty Ltd. Partnership* v. *United States*, 617 F.2d at 214; *DeVito* v. *United States*, 413 F.2d 1147, 1153-1154 (Ct. Cl. 1969); *Jackson* v. *United States*, 12 Cl. Ct. 363, 365-366 (1987).

those continuing lease enforcement efforts to proceed. See J.A. 168-171; App., *infra*, 2a.

For a period of several years following the enactment (and repeal) of the OBPA, petitioners' conduct has thus been significantly inconsistent with any election to treat these leases as at an end. Their continued efforts to demand and obtain performance under the leases, which have compelled several agencies of the United States to expend considerable resources in continued administration of these leases, represent an "election" that bars any claim for restitution. Petitioners have "affirmed the contract by continuing to perform;" they may therefore obtain recovery only for such damages as are proven to result from the asserted "partial breach" of contract. *ARP Films, Inc.* v. *Marvel Entertainment Group, Inc.*, 952 F.2d at 649; see also *Sun Oil Co.* v. *United States*, 572 F.2d 786, 801, 817 (Ct. Cl. 1978).

IV. PETITIONERS HAVE RECEIVED ANY RELIEF TO WHICH THEY ARE ENTITLED

Outside the four corners of this litigation, petitioners have requested and been granted all of the relief to which they may be entitled. Even if some technical breach of the lease agreements occurred, which we dispute, petitioners would be limited to the recovery of such damages as were actually caused by delay imposed by the OBPA. See *Sun Oil Co.* v. *United States*, 572 F.2d at 804- 806.[25] Because the continuing objections of North Carolina to the plan of exploration preclude petitioners from proceeding with *any* exploration

[25] The United States is not liable for damages from a delay in performance that is not caused by its actions. *Merritt-Chapman & Scott Corp.* v. *United States*, 528 F.2d 1392, 1397 (Ct. Cl. 1976). Government delays in the approval of OCS lease operations do not support a claim for damages if the lessee's operations would have been delayed for independent reasons. *Sun Oil Co.* v. *United States*, 572 F.2d at 804-806, 817.

or development activities under these leases, petitioners cannot establish that they have suffered any actual injury or damages from the alleged delay in the approval of those plans by the United States.

To the contrary, both before and after enactment of the OBPA, petitioners have requested the Secretary to *suspend* operations under these leases while their challenges to the State's CZMA objections are litigated to conclusion. Both before the OBPA was enacted and after it was repealed, those requests were granted by the Secretary. See pages 9, 15, 17, *supra*. The lease suspensions requested by petitioners thus continue in effect until this day, and they will remain in effect until petitioners' challenge to the State's objections are finally resolved in the separate litigation commenced by petitioners in federal district court. See page 17, *supra*.

Throughout the lengthy period of the lease suspensions that petitioners have requested, the terms of the leases have been continuously extended and petitioners have been relieved of any obligation to make lease rental payments. See page 9, *supra*. Petitioners thus retain the same rights under their leases that they had when the lease suspension first went into effect *before* the OBPA was enacted, in July 1989. As the court of appeals concluded, the "real complaint" of petitioners is that they have been unable throughout this period to satisfy or "override North Carolina's CZMA objections." Pet. App. 16a. Petitioners' continuing failure or inability to provide the data and analysis that would allow them to resolve the State's long-stated environmental objections is "not attributable to" the United States and "does not create an entitlement to any refund of the consideration paid to obtain the lease." *Id.* at 18a.[26]

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[26] Because the court of appeals reversed the trial court's conclusion that petitioners were entitled to restitution, it did not address the government's further arguments that the trial court had incorrectly calculated the amount of the award. Accordingly, if this Court reverses the decision of the court of appeals on the issue of liability, the case should be remanded to the court of appeals for further proceedings regarding the proper calculation of the amount of the award.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2000

APPENDIX

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New Orleans, LA 70123-2394

Attention: Mr. Ralph Melancon
Regional Supervisor

February 21, 1995

Dear Mr. Melancon:

On November 9, 1994 and again on December 1, 1994 Mobil received a letter from the MMS terminating the suspension for the following OCS leases effective November 10, 1994:

OCS Lease Numbers

00225 00227 00229 00231 00233 00235 00237 00239 00242 00244 00448 00226 00228 00230 00232 00234 00236 00238 00240 00243 00446

The November 9 MMS letter indicated that the suspensions were being terminated because the two studies recommended by the Environmental Sciences Review Panel were sent to the Commerce Secretary (Secretary) and

because on September 2, 1994 the Secretary had denied Mobil's appeals of North Carolina's denials of consistency. However, the time period to seek judicial review of the Secretary's decisions had not expired when the MMS terminated the suspensions. On January 18, 1994 Mobil filed suit challenging the Secretary's decisions with regard to the Manteo Unit. (*Mobil Exploration & Producing Southeast Inc. v. Ronald H. Brown*, Case No. 1: 95CV00093, United States Court for the District of Columbia). Since the Secretary's decision is being challenged, it is not a final decision and will not be until it is upheld by a final nonappealable judgment issued from a court with competent jurisdiction. Thus, Mobil requests a reinstatement of the suspensions effective November 10, 1994 in order that the terms of subject leases be extended for a period of time equal to the period the suspensions are in effect and to allow Mobil two drilling seasons under the EP thereafter.

Mobil makes this request (1) pursuant to 30 C.F.R. § 250.10(b)(6), which allows the Regional Supervisor to grant suspensions when inordinate delays are encountered by the lessee(s) in obtaining required permits or consents, *including judicial challenges or appeals*; and (2) pursuant to the July 12, 1989 Memorandum of Understanding with the State of North Carolina and the MMS which states:

> If the state objects to Mobil's certificate of consistency, or if any other administrative or *judicial appeals arise*, . . . upon Mobil's application, [the MMS will] issue additional suspensions of operations, pursuant to 30 C.F.R. § 250.10, to allow for the resolution of such matters and to allow Mobil two drilling seasons under the EP thereafter. For the purpose of this paragraph, a drilling season is the period of May through October 31.

Any questions please contact the undersigned.

Very truly yours,

/s/ illegible
Toni D. Hennike

cc: Chris C. Oynes
Regional Director
MMS, Gulf of Mexico OCS Region
1201 Elmwood Park Blvd.
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MS 5322

JUN 02 1995

Mobil Exploration & Producing U.S. Inc.
Attention: MS. Toni D. Hennike
Post Office Box 650232
Dallas, Texas 75265-0232

Dear Ms. Hennike:

Pursuant to Minerals Management Service's (MMS) letter dated October 9, 1992, suspensions of operations (SOO) were issued for the 21 leases in the Manteo Unit, Agreement No. 752-290001-0, offshore North Carolina. The letter states that the SOO's will expire when the two studies recommended by the Environmental Sciences Review Panel have been accepted by the MMS and when the U.S. Department of Commerce renders a decision on the appeals from the State of North Carolina's Denial of Consistency Certification on the Exploration Plan and the NPDES Permit.

By letter dated July 22, 1994, the MMS Transmitted the two aforementioned studies to the Department of Commerce, and on September 2, 1994, the Secretary of Commerce issued a decision upholding North Carolina's objection to your proposed Exploration Plan. The MMS letter dated November 9, 1994, provided formal notice that the suspensions for the 21 leases in the Manteo Unit were terminated and that rental payments are to be calculated from November 10, 1994.

Your letter dated Febrary 21, 1995, requests, pursuant to 30 CFR 250.10(b)(6) and the Memorandum of Understanding (MOU) of July 12, 1989, with the State of North Carolina and the MMS, the reinstatement of the SOO's for the Manteo

Unit leases effective November 10, 1994. Our office did not receive the original of this letter; however, a facsimile was received on April 4, 1995.

Mobil filed suit in the U.S. District Court for the District of Columbia (Case No. 1:95V00093) January 18, 1995, challenging the Secretary's decision and stating that the time period to seek judicial review had not expired when the MMS terminated the SOO's.

Although it is our position that the terms of the SOO approval letter dated October 9, 1992, were satisfied, we believe new suspensions are appropriate pursuant to 30 CFR 250.10(b)(6) and the MOU while Mobil seeks judicial review of the Secretary's decision.

Therefore, we hereby approve SOO's for the Manteo Unit leases from November 10, 1994, until a nonappealable final judgment concerning the Secretary of Commerce's decision is issued from a court of competent jurisdiction. However, pursuant to 30 CFR 250.10(e), the SOO's shall not exceed five years.

We request that Mobil immediately notify this office of the decision rendered in its present suit, referenced above, by the delivery of a copy of said decision.

The terms of the Manto Unit leases will be extended for a period of time equal to the period the SOO's are in effect. Rental payments for the 21 leases in the Manteo Unit will be required during the time of the SOO's in accor dance with 30 CFR 218.154(b)(2). The Manteo Unit includes

the following leases:

OCS-A 00225	OCS-A 00236
OCS-A 00226	OCS-A 00237
OCS-A 00227	OCS-A 00238
OCS-A 00228	OCS-A 00239
OCS-A 00229	OCS-A 00240
OCS-A 00230	OCS-A 00242
OCS-A 00231	OCS-A 00243
OCS-A 00232	OCS-A 00244
OCS-A 00233	OCS-A 00446
OCS-A 00234	OCS-A 00448
OCS-A 00235	

If you have any questions, please call Mr. Al Durr at (504) 736-2659.

Sincerely,

(ORIG. SGD.) GARY L. LORE
Chris C. Oynes
Regional Director

[SEAL OMITTED]

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

Dec. 8, 1999

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Re: Appeals of Mobil Oil Exploration and Producing Southeast, Inc. from Objections by the State of North Carolina to its Drilling Discharge Plan and its Plan of Exploration for Monteo Leases

Dear Counsel:

On September 2, 1994, Secretary of Commerce Brown issued a decision declining to override two objections by the State of North Carolina (North Carolina) to the proposed drilling discharges (PDD) and overall Plan of Exploration (POE) by Mobil Oil Exploration & Producing Southeast, Inc. (Mobil) at a site about 38 miles offshore North Carolina. Secretary Brown made the decision pursuant to section 307(c) (3) of the Coastal Zone Management Act (CZMA). Mobil challenged this decision in Federal Court as being arbitrary and capricious in violation of the Administrative Procedure Act (APA). On March 11, 1996, the Court ordered a stay of the litigation and remanded the matter to me for a determination whether the administrative record should be

reopened to receive two studies, one on the impacts of Mobil's proposals on benthic resources and the other on socio-economic resources. *Mobil, et al. v. Brown, et al.*, 920 F. Supp. 1 (D.D.C. 1996).

During this same period, Mobil and Marathon Oil Co. brought an action against the United States for restititution of rents and bonuses paid for the leases underlying the POE and PDD. Mobil argued that the passage of the Outer Banks Protection Act prevented it and Marathon from pursuing their rights under the leases. *Marathon Oil Company v. United States*, 177 F3d 1331 (Fed. Cir. 1999), *petition for cert. filed*, August 11, 1999. In addition, since 1995, several attempts to settle these matters have been initiated and failed.

I decline to reopen the record to admit the two studies at issue in *Mobil v. Brown*. Both this Department and parties to appeals under the CZMA have a strong interest in the finality of my decisions and the administrative process. Moreover, even were I to reopen the record to admit the two studies and reconsider my decision, I would still lack sufficient information to override North Carolina's objection. Thus, I am persuaded that the interest in finality should prevail over any interest the parties may have in supplementing the record. In light of this decision, I continue to encourage Mobil, North Carolina, and other interested parties to work toward resolution of North Carolina's need for additional scientific information about the impacts of Mobil's proposed projects on its coastal uses and resources.

Discussion

On September 2, 1994, Secretary of Commerce Ron Brown declined to override objections by the State of North Carolina (North Carolina) to the Plan of Exploration (POE)

and the Proposal to Discharge Drilling Waste (PDD) associated with the POE submitted by Mobil Oil Exploration & Producing Southeast, Inc. (Mobil). The basis of North Carolina's objections was a lack of necessary information upon which to find the proposals consistent with its coastal management program. North Carolina specifically identified a need for the preparation of a four part fisheries study. In reviewing Mobil's appeals, Secretary Brown was required to determine whether the proposed projects were consistent with the objectives of the CZMA or necessary in the interest of national security. See 15 CFR 930.120, 930.121 and 930.130.

The 1994 decisions were based upon two administrative records that total approximately 10,000 pages of information. In spite of the quantity of material, certain information necessary to the decision was not provided by Mobil; specifically the record lacked information on: (1) the cumulative effects of Mobil's discharges; (2) the ecological effects of Mobil's discharges; (3) the effects on various fisheries of Mobil's discharges; (4) the effects on near-surface animals and planktonic resources of Mobil's discharges; (5) the effects of the discharges on benthic resources; and (6) the socio-economic effects of the POE. These information gaps precluded the conclusion that Mobil's POE and PDD "will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest." 50 CFR 930.121(b).[27]

---

[27] See, Decision and Findings in the Drilling Discharge consistency appeal of Mobil Exploration & Producing Southeast, Inc. from an Objection by the State of North Carolina, September 2, 1994, pp. 40-41; Decision and findings in the Plan of Exploration Consistency Appeal of Mobil Exploration & Producing Southeast, Inc. from and Objection by the State of North Carolina, September 2, 1994, p. 33.

The question before me now is whether to reopen the record to admit the two studies and reconsider the prior decisions. I decline to do so.

First, this Department has an interest in the finality of its administrative processes. The regulations of the National Oceanic Atmospheric Administration (NOAA) implementing the CZMA provide for a Secretarial override procedure that includes the filing of technical information, briefs, federal agency comments and, if necessary, a public hearing. See, 15 CFR 930.125, 930.126, 930.127, and 930.129. The regulations provide for extensions of time to be granted, normally in the amount of 15 days. 50 CFR 930.125(c), and 930.126(b). In the case of Mobil's appeals the development of the administrative records was allowed to take eighteen months. The administrative records in both appeals were closed and reopened twice, finally closing May 29, 1992.[28] No request to hold the record open for pending research relevant to my decision was ever submitted by Mobil, North Carolina or any federal agency.

The two studies at issue were completed in March and September of 1993, long after the record closed in May 1992. Yet the studies were still not submitted until July 22, 1994. The studies were submitted by the Minerals Management Service (MMS) without any request to reopen the record or

[28] The administrative record for the PDD was first closed on June 18, 1991. It was reopened at North Carolina's request on April 29, 1992, and remained open for one month as agreed by Mobil and North Carolina, closing for the second time on May 29, 1992, with the submission of Mobil's Supplemental Final Statement. All federal agency comments were received prior to the first closing of the record, including those of the Minerals Management Service dated, December 27, 1990, on the PDD and June 1, 1991, on the POE.

any opportunity for the parties to comment. Subsequently, through its lawsuit, *Mobil v. Brown*, Mobil urged the court to consider the benthic resources and socio-economic impact studies in reviewing Secretarial decisions. Yet, Mobil never requested that I consider the studies during the pendency of its appeals. In fact, in its briefs to me, Mobil stated that the studies "are not even associated with the information issues at issue here."[29]

As provided in the CZMA regulations, consistency decisions are based upon the administrative record developed by the parties and all other interested agencies and members of the public. It is not practical or reasonable to reopen the record now to reconsider prior decisions in light of these two studies. Nor was it reasonable to do so in July 1994, six weeks before the release of the final decisions. Once the administrative record has closed and the decision making process begun, the record should not be reopened unless good cause is shown by the moving party and no prejudice will inure to the other parties. No such request, argument or showing was ever made in these cases. The receipt of these studies two years after the administrative records in these appeals closed, was untimely.

Second, these studies address only two of the six information gaps identified in the 1994 decisions. Were I to reopen the record to consider these studies, and if these studies were sufficient to address the need for analyses and site specific information on benthic resources and socio-economic impacts, there would still remain significant gaps in information necessary for me to override North Carolina's objections. Specifically, for the PDD, I would still lack

[29] See, Mobil's supplemental Final Brief on POE at 11, and Mobil's Supplemental Final Brief on the PDD at 12.

information on: 1) the potential for bioaccumulation of heavy metals and other toxic substances; 2) a worst case analysis that accounts for cumulative impacts and related ecological effects; (3) impacts on near-surface and planktonic resources; and 4) the ecological functions of the Sargassum community. For the POE, I would still lack: 1) site specific information on fishery resources; 2) information on near-surface animals and planktonic resources, particularly as they relate to the Sargassum communities that harbor important resources for fish in their larval state; and 3) site specific studies on potential impacts to the fishery resources.

Without sufficient information to identify the adverse impacts of the proposed projects to the state's coastal resources, I cannot make the finding required by 15 CFR 930.121(b). The two studies at issue cannot, alone, address all the information gaps identified in my September 2, 1994, decisions.

For the foregoing reasons, I decline to reopen the record to include the two new studies and reconsider my decision in this matter.

Sincerely,

/s/ WILLIAM M. DALEY
WILLIAM M. DALEY

cc: The Honorable Stanley S. Harris
United States District Court
for the District of Columbia

REPLY

BRIEF

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REPLY BRIEF OF PETITIONER MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

The Federal Circuit grounded its holding on two propositions: first, that "the [OBPA] was not the operative cause of [Mobil's and Marathon's] failure to obtain the required permits," Pet. App. 2a, and second, that the repeal of the OBPA absolved the Government of any liability for its action, *id.* 13a. In its Brief, Mobil demonstrated conclusively that the Federal Circuit erred in relying on "causation" in a case involving restitution and on a post-lawsuit retraction to cure an anticipatory repudiation.

Having no effective answer to Mobil's arguments, *see also* Mobil Op. Cert. Reply 1, 5, the Government falls back on two positions that are wholly unsupported by the Federal Circuit's opinion: (1) that the OBPA did not constitute a "material breach" of Petitioners' leases and (2) that Mobil has waived its claims.[1] Neither argument can save the decision below.

A. Material Breach.

1. *The Undisputed Facts.* a. While the Government did not promise that Mobil would succeed in finding oil or gas, the Government *did* promise that it would approve Mobil's POEs, PODs, and drilling permits if they comply with the OCSLA. *See* Lease § 1, Marathon Pet. App. 175a (leases issued "pursuant to" and "subject to" the OCSLA); *see also* Pet App. 70a, 72a (Government promised Mobil a

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[1] We deal below, *see* p. 2 n.3, with the Federal Circuit's unexplained (and inexplicable) statement that there was "no evidence of a breach of contract by the United States." The Government's third argument – that Mobil has received all of the remedy it deserves – is merely a corollary of its material breach argument.

specific "regulatory process").[2] In consideration of that promise, Mobil paid the Government up-front bonuses totaling $78 million.

The OBPA clearly compelled a breach of this duty. Without amending the OCSLA, the OBPA superseded the OCSLA plan- and permit-approval process for which Mobil had contracted and replaced it with an altogether different and much more onerous scheme that imposed OBPA requirements for the approval of "*any* exploration plan," "*any* development and production plan," "*any* application for permit to drill," or "*any* drilling" on "*any* lands" of the North Carolina OCS. OBPA § 6003(c)(1) (emphasis added). Thus, the OBPA applied not only to Mobil's POE for its first exploratory well, but also to every subsequent POE, POD, and drilling permit that Mobil would need throughout the life of the leases. Even the Federal Circuit agreed that the OBPA, having been enacted in 1990, was not an "applicable statute" to which the 1981 leases were subject: "To read the [leases] ... as incorporating [the OBPA] ... would raise serious questions about illusory contracts, and perhaps ... constitutional concerns." Pet. App. 10a.[3]

b. There is no merit in the Government's suggestion that the OBPA was simply a means of "implementing" the pre-existing "applicable statutes" to which Mobil's leases were subject. Gov't Br. 23. NEPA's requirements had been

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[2] As only one example, pursuant to OCSLA § 1340(c) and § 1 of the leases, the Government agreed to approve Mobil's initial POE "within thirty days of its submission," unless it was defective under the OCSLA.

[3] The Federal Circuit's statement that "there is no evidence of a breach of contract by the United States," Pet. App. 16a, cannot be reconciled with its recognition that the OBPA was not authorized by § 1 of the leases, *see id.* 9a-10a. Instead, as Mobil has previously noted, *see* Mobil Br. 22 n.19, this statement can only be understood in the context of the court's erroneous reliance on causation.

fully satisfied prior to the OBPA by DOI's unprecedented 2000-page environmental report, which fully supported DOI's NEPA "Finding Of No Significant Impact." J.A. 139. The OCSLA's POE approval requirements had been met on the basis of *existing* information, exactly as required by OCSLA § 1346(d) and reflected in DOI's finding that the POE was "approvable in all respects" but for the OBPA's moratorium. Marathon Pet. App. 194a. Moreover, the OBPA addressed only the Secretary of the Interior's responsibilities, not the State's or Secretary of Commerce's under the CZMA.

c. After receiving the OBPA scientific panel's report, nearly a year after it was due, *see* Mobil Br. 8, Secretary Lujan reported to Congress in April 1992 that he had sufficient information "to make a reasoned decision about the activities presently proposed ...." Marathon Pet. App. 201a. He nonetheless acceded to the Panel's recommendation to complete two additional studies – which ultimately were not completed until 1994 – before he could approve Mobil's POE for its first exploratory well. He also agreed with the Panel that additional environmental information would be required for each and every stage of OCS development through "post production." *See id.* In doing so, the Secretary interpreted the OBPA as requiring years of additional studies not only for Mobil's first exploratory well but also for every subsequent exploratory, delineation, and production well. *See id.* 199a. *See generally Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, as the Government conceded below, "those additional potential activities remained barred by the OBPA [even] after the Secretary's 1992 OBPA certification." Fed. Cir. Br. 30. Moreover, Secretary Lujan reported that further studies for

these activities would "not begin in earnest prior to reviewing the initial exploration drilling." Marathon Pet. App. 202a.[4]

Consequently, the OBPA constituted (1) an open-ended prohibition (2) on the approval of any POE, any POD, or any drilling permit (3) for every well that Mobil might need to drill offshore North Carolina, until the Act's requirements were satisfied. The OBPA thus pervaded the entire contractual relationship between Mobil and the Government and constituted a wholesale restructuring of the bargain the parties had struck in 1981.

2. *The Settled Law.* The Government recognizes that the issue of materiality turns on the application of "basic principles of contract law," Gov't Br. 24-25 (quoting *United States v. Allegheny County*, 322 U.S. 174, 183 (1944)). However, the Government does not even mention the *Restatement (Second) of Contracts* (1981), "from which [courts are] inclined to fashion ... federal common law rule[s]" since the principles contained in the *Restatement* "represent the 'prevailing view' among the states." *Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997) (quoting E. Allan Farnsworth, *Farnsworth on Contracts* § 7.3 (1990)). All five of the factors set forth in § 241 of the *Restatement*

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[4] Contrary to the Government's suggestion, Secretary Lujan's April 1992 certification did *not* cure the breach precipitated by the OBPA. He was not acting "voluntarily," Gov't Br. 15, or "on his own initiative," *id.* at 35, in further refusing to "issue a permit, approve the exploration plan, or allow any drilling," Marathon Pet. App. 202a, because the OCSLA directed that he "shall" approve Mobil's POE within 30 days. OCSLA § 1340(c)(1). Rather, he was acting pursuant to the explicit recommendation of the scientific panel, which the OBPA created, *see* OBPA § 6003(e), and which required the Secretary to abide by its recommendations or to provide Congress with his "detailed justification" for departing from those recommendations, *see id.* § 6003(c)(3)(A).

for determining whether a breach is material condemn the Government's argument.[5]

a. *Performance Reasonably Expected.* The first factor in determining whether a breach is material is "the extent to which the injured party will be deprived of the benefit which he reasonably expected from the exchange." *Restatement, supra*, § 241 cmt. b. The focus is on the parties' "expect[ations]" at the time of "the exchange."[6] When Mobil entered into the "exchange" at issue here in 1981, it reasonably "expected" that the Government would abide by its promise – the principal one the Government made in return for $78 million – to approve POEs, PODs, and other drilling permit applications according to the well-defined schedules prescribed in the OCSLA and incorporated by reference into § 1 of the leases. When Congress enacted the OBPA, it simply discarded the OCSLA's approval process and thus deprived Mobil of the principal performance that it expected from the Government. *See generally* I George E. Palmer, *The Law of Restitution* § 4.5, at 410 (1978) ("In deciding whether the breach is essential enough to justify restitution, a court should be concerned primarily with the objective of the plaintiff in seeking the performance promised by the defendant.").

Ignoring altogether the leases' specific incorporation of the OCSLA, the Government and its *amici* cite *Secretary*

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[5] Although all five *Restatement* factors confirm the Court of Federal Claims' finding of materiality, a plaintiff need not satisfy all five conditions to prevail. *See Restatement, supra*, § 241 cmt. a.

[6] *See also Restatement (First) of Contracts* § 275(a) (1932) (considering "[t]he extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated"); *Link v. Department of the Treasury*, 51 F.3d 1577, 1583 (Fed. Cir. 1995) (finding a material breach where the injured party was "deprived of the full benefit ... *for which he had bargained*").

of the Interior v. California, 464 U.S. 312 (1984), in suggesting that OCS leases confer no rights at all. But nothing in *Secretary of the Interior*, *id.* at 337, 339 (holding that OCS lease sales are not subject to the CZMA and referring to an OCS lessee's "priority" in obtaining permits), sustains the Government's unilateral and drastic revision of the agreed-upon process for plan and permit approvals under the OCSLA, as occurred here. To the contrary, the Court's opinion in that case in careful detail discusses the OCSLA approval process without *any* suggestion that lessees do not have important contractual rights regarding that process. *See id.* at 335-41.

Section 241's emphasis on the "extent" of the breach reflects the commonsense proposition that "[a] quantitatively serious breach is more likely to be considered material." John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 11.18, at 415 (4th ed. 1998). The repudiation occasioned by the OBPA was "quantitatively serious" in at least two respects. First, the Government's principal promise to Mobil, in return for the $78 million that it paid for its leases, was that Mobil's applications would be approved if consistent with the OCSLA and other "applicable" statutes. The OBPA unquestionably breached that promise. *See* pp. 1-2 & n.3, *supra*.

Second, the OBPA flatly prohibited the Government from performing its contractual duties with respect to Mobil's exploratory well for a *minimum* of 13 months. Even the Government concedes that, as applied, the OBPA banned *all* activities for at least 20 months (*i.e.*, until Secretary Lujan's April 1992 report to Congress). In fact, the requirements imposed by the OBPA on Mobil's first POE were not lifted until July 1994, when the last OBPA-precipitated study for that well was completed almost four years after the POE should (and *would*) have been approved under the OCSLA. The OBPA's prohibitions as to all future drilling plans extended *ad infinitum*.

The *Restatement* cites *Northern Helex Co. v. United States*, 455 F.2d 546 (Cl. Ct. 1972), as an example of a case "based on the extent of deprivation of benefits to the injured party." *Restatement, supra*, § 241 reporter's note. In *Northern Helex*, the court expressed "not the slightest doubt" that the Government's failure to perform by withholding payments "over many months" constituted a material breach. *Northern Helex*, 455 F.2d at 550. *A fortiori*, there cannot be "the slightest doubt" that the breach here is material.[7]

In attempting to explain away Mobil's reasonable "expect[ations]" under its OCS leases, the Government contends that Mobil's leases were issued "subject" to statutes and regulations permitting lease suspension in certain circumstances, *see* Gov't Br. 23, and that "[u]nder the[se] applicable statutes and regulations, the United States was entitled to require a suspension of the leases to 'conduct an environmental analysis,'" *id.* 33. The Government argues that this "is precisely what Congress directed in enacting the OBPA," *id.*, and thus there was no breach. Neither the OCSLA nor applicable regulations sustain this argument.

The Government's argument that the "national interest" suspension authority of OCSLA § 1334(a)(1)(A) supports it here, *see* Gov't Br. 31-32, fails to report that such

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[7] The Government disingenuously relies on non-contract cases refusing to impose "coercive sanction[s]" due to government delay. Gov't Br. 37-38. But the imposition of a common law monetary remedy against the Government has never been equated with a prohibition against governmental conduct. *See Winstar*, 518 U.S. at 881-84. Thus, the Government's refusal to perform on the timetable promised in a contract has frequently been deemed a material breach without any suggestion that non-contract cases limit the available remedy. *See, e.g., Pinewood Realty Ltd. Partnership v. United States*, 617 F.2d 211, 215 (Cl. Ct. 1980) (one month delay in conveying property); *Northern Helex*, 455 F.2d at 550 (two year delay in payment); *Overstreet v. United States*, 55 Cl. Ct. 154, 174 (1920) (five week delay in installment payment).

suspensions may be granted only "*at the request of a lessee*." The only OCSLA authority for a suspension without the lessee's consent applies where the Secretary finds a "threat of *serious*, *irreparable*, or *immediate* harm or damage" to life, property, mineral deposits, or the environment. OCSLA § 1334(a)(1)(B) (emphasis added).[8] There has never been any contention that these circumstances applied here; DOI had found just the opposite, *see* p. 3, *supra*, and *at most*, the OBPA suggested that existing environmental studies purportedly had not "allayed concerns" about the adequacy of environmental information. OBPA § 6003(b)(7).[9]

The Government's reliance upon 30 C.F.R. § 250.10(b)(4),[10] which allows the Secretary to suspend a lease when it "is necessary ... to conduct an environmental analysis," Gov't Br. 32, is similarly misplaced. This argument simply recycles and repeats under a different guise the Government's untenable contention that the OBPA, although not an "applicable statute" to which the leases were subject under their express terms, merely implemented pre-existing "applicable statutes" such as NEPA and the OCSLA. *See* pp. 2-3, *supra*. But in agreeing to be bound by "applicable statutes," Mobil surely did *not* agree to a suspension for an "environmental analysis" required by an *inapplicable* statute like the OBPA.

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[8] This suspension power was doubtless the one referred to in the House report cited by the Government as authorizing a more-than-30-day delay in approving a POE, *see* Gov't Br. 32 n.11.

[9] The Government's reference to its powers to cancel OCS leases "under the terms of the OCSLA," Gov't Br. 8, does not aid it here, because such cancellation must be accompanied by compensation. *See* OCSLA § 1334(a)(2)(C).

[10] 30 C.F.R. § 250.110(b)(4) as recodified.

DOI never found – nor could it have found – that the OCSLA, NEPA, or any other "applicable statute" made it "necessary" to suspend the leases to conduct an environmental analysis. Indeed, only two months prior to the OBPA's enactment, DOI completed its 2000-page Environmental Report on Mobil's proposed well – calling it "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program," J.A. 179 – and concluded under NEPA that Mobil's well "would not result in *any* significant environmental impacts." Pet. App. 5a (emphasis added); *accord* J.A. 139 (finding of no significant impact).

DOI itself recognized this proposition, because it did not invoke § 250.10(b)(4) to justify the suspensions when the OBPA was enacted in 1990 (as the Government does now). Instead, DOI acknowledged that it was suspending Mobil's leases *in order to comply with the OBPA*, citing § 250.10(b)(7) as authority for its action. J.A. 129-30, 132. Tellingly, in its brief to this Court, the Government does not even mention § (b)(7) – which allows suspensions when judicial decrees "prohibit[]" OCS activities "or the permitting of those activities."[11]

The clash between the OBPA and Mobil's "expect[ations]" upon entering the leases could not be

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[11] In the Federal Circuit, the Government argued that § (b)(7) was "totally irrelevant" and "clearly demonstrates a mistake" by DOI. Fed. Cir. Br. 26. However, it was not necessary to suspend operations under § (b)(4) to conduct an environmental analysis, because the OBPA itself guaranteed that there could be no operations during the pendency of the studies required by that Act. Section (b)(7) is used where a judicial decree, or similar outside factor – here the OBPA – has "prohibit[ed]" OCS activities, and thus § (b)(7) serves only as a device to "suspend" the running of a lease's primary (here 10-year) term and thereby to ensure that the lease is extended during the period of such prohibition.

clearer. As the Court of Federal Claims found – and as the Government has not seriously disputed –

> [C]ommon sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenuous and unilaterally interruptable drilling rights.

Pet. App. 63a.

b. *Adequacy of Compensation.* In determining materiality, courts should also consider "the extent to which the injured party can be adequately compensated for the part of th[e] benefit of which he will be deprived." *Restatement*, *supra*, § 241(b). An explanatory note indicates that § 241(b) is concerned primarily with an injured party's ability to prove its damages with sufficient certainty. *See id.* cmt. c.

Here, it would have been impossible to calculate the actual damages Mobil suffered from the OBPA: There was no way of predicting either in 1990 (when the Act was passed) or in 1992 (when the suits were filed) (1) whether the OBPA would ever allow DOI to grant all of the permits that Mobil would need over the life of the leases to explore, produce, and develop the oil and gas that might be found offshore North Carolina or (2) if such permits were ultimately granted, whether the economic, technical, or other considerations Mobil would then confront would make it feasible for Mobil to proceed with exploration and production.

By contrast, Mobil's action for rescission of the lease agreements and restitution of its up-front bonus payments does not pose any problems of proof. As the foremost scholar of the law of restitution has observed, "proof of

damages may present unusual difficulties, whereas proof of the value of [a plaintiff's] performance is relatively easy, and restitution is the means by which he recovers the value of that performance." I Palmer, *supra*, § 4.1, at 368. Indeed, citing the relative facility of proving restitution as compared to consequential damages, Professor Corbin noted that "even courts that do not like to recognize an anticipatory repudiation as a breach for which an action for damages will lie are willing to maintain an immediate action for restitution of the consideration paid." 4 Arthur L. Corbin, *Corbin on Contracts* § 978, at 929-30 (1951). *See also* Mobil Br. 25-26.

c. *Forfeiture.* The *Restatement* also focuses on "the extent to which the party failing to perform or to offer to perform will suffer forfeiture." *Restatement, supra*, § 241(c). The more a breaching party has performed, the more likely it will, on a finding of material breach, suffer forfeiture of any part performance it has rendered; consequently, "a failure is less likely to be regarded as material if it occurs late, after substantial preparation or performance, and more likely to be regarded as material if it occurs early, before such reliance." *Id.* cmt. d; *accord* Calamari & Perillo, *supra*, § 11.18, at 414 ("The earlier the breach the more likely it will be regarded as material."). Courts should therefore consider "to what extent, if any, the contract has been performed at the time of the breach." Calamari & Perillo, *supra*, § 11.18, at 414.

Here, although the Government's repudiation did not occur until nine years after the leases were executed in 1981, it occurred *before* DOI had approved Mobil's initial POE pursuant to OCSLA § 1340(c)(1), which both lower courts correctly described as the "first step" in the OCS process. Thus, there was no threat in this case that the Government would lose any of its part performance *because it had not provided any*.

d. *Cure.* The likelihood that a breach will be cured is another relevant consideration in determining materiality. *See Restatement, supra*, § 241 (d) & cmt. e. Here, there was no such possibility because DOI was required to comply with the OBPA until Congress repealed the Act, three-and-a-half years after Mobil filed suit and one month after the decision of the Court of Federal Claims, when it was too late to retract the repudiation and thus cure the Government's earlier repudiation. Mobil Br. 35-37.

e. *Lack of Good Faith.* Finally, a breaching party's failure to adhere to accepted standards of good faith and fair dealing is "a significant circumstance in determining whether a failure is material ...." *Restatement, supra*, § 241 cmt. f; *see also Link*, 51 F.3d at 1582 (suggesting that bad faith alone is sufficient to support a determination of material breach). The undisputed facts of this case confirm DOI Assistant Secretary O'Neal's description of the OBPA as an act of "bad faith." J.A. 182.

Central to the breaching party's good faith is whether the breach was intentional. Indeed, § 275(e) of the *Restatement (First) of Contracts* (from which the present-day § 241(e) is derived) observes that "the willfulness of the breach ... so far increase[s] the demerit of the wrongdoer that the law is less inclined if a breach is willful to require the injured party to perform." *Restatement (First) of Contracts* § 275(e) & cmt. a; *accord* Calamari & Perillo, *supra,* § 11.18, at 414-15 & n.13 ("[W]illful breach is more likely to be regarded as material."); 6 Samuel Williston, *A Treatise on the Law of Contracts* § 842, at 171 (3d ed. Walter H.E. Jaeger, ed., 1962) ("Willfulness of the breach ... is an important element in the case."); *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (Cardozo, J.) ("The willful transgressor must accept the penalty of his transgression.").

It is undisputed in this case that the Government's repudiation of Mobil's leases was intentional, for the

Government abandoned its arguments under the sovereign acts and unmistakability doctrines. Accordingly, it did not challenge on appeal the Court of Federal Claims' finding that the OBPA was "narrowly tailored to target" Mobil's leases, Pet. App. 86a, and "specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina," *id.* 91a. *See generally United States v. Winstar Corp.*, 518 U.S. 839, 898 & n.45 (1996) (government actions "directed principally and primarily at plaintiffs' contractual right" are not sovereign acts).

Both the text and the clear legislative history[12] of the OBPA confirm that the Act was targeted at Mobil's proposed well and was specifically intended to abrogate Mobil's lease rights. *See generally* Mobil Br. 5-7. The text of the OBPA refers by name to "the Mobil Oil Company," OBPA § 6003(b)(7), and supporters and opponents of the OBPA alike described the Act as a "moratorium" on Mobil's exploration and production activities, *see* 136 Cong. Rec. 22,275 (1990) (Rep. Jones); J.A. 113 (DOI Secretary Lujan).[13]

According to the *Restatement*, "[g]ood faith performance ... of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified

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12 In *Winstar*, this Court indicated its willingness to examine legislative history in determining questions of contract breach, where the pitfalls often associated with the consideration of legislative history in the context of statutory interpretation are not implicated. *See Winstar*, 518 U.S. at 902 n.50.

13 As these citations demonstrate, the Government's suggestions that the "legislative record" does not contain evidence of the OBPA's purpose, *see* Gov't Br. 33 n.13, and that the OBPA was "enacted out of a concern of Congress" that DOI "give proper attention to" NEPA and the CZMA, *see id.* 12, are simply false. In any event, the Government's failure to appeal the trial court's finding that the OBPA was "specifically enacted to delay indefinitely" Mobil's OCS activities precludes it from now seeking to attribute a different purpose to the Act.

expectations of the other party." *Restatement, supra*, § 205 cmt. a. Far from acting with "faithfulness to an agreed common purpose" of the OCS leases and "consisten[tly] with [Mobil's] justified expectations," the OBPA was aimed specifically and intentionally at undermining Mobil's lease rights.

3. *Causation/Repeal.* Ignoring the relevant factors establishing the materiality of its breach, the Government simply plows forward, acting as if the repeal of the OBPA somehow relieves it of its breach. Specifically, the Government contends that "[p]etitioners' ability to undertake exploration activities under these leases was at all times – both before enactment of the OBPA and after its repeal – blocked by North Carolina's objections under the CZMA." Gov't Br. 36. This, however, is not an argument about breach or materiality – it is an argument about causation. Indeed, in the very next sentence of its brief, the Government unabashedly invokes the concept of "but for" causation: "*Even if the OBPA had never been enacted*, petitioners would … have experienced precisely the same delay in proceeding with the proposed operations" as a result of North Carolina's CZMA objections. *Id.* (emphasis added). Such arguments, in the face of Mobil's unrefuted demonstration that both causation and a post-complaint OBPA repeal are irrelevant to a claim for restitution, in and of themselves expose the weakness of the Government's arguments in this case.[14]

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[14] Moreover, as demonstrated in Mobil's Opening Brief, North Carolina's objections to the first POE and the NPDES permit under the CZMA were curable by performing the studies North Carolina demanded (or by no-discharge operations that would remove the need for an NPDES permit). Mobil Br. 9 n.7, 24 n.21. It is no answer to speculate that the delay precipitated by North Carolina's CZMA objections *might* have extended beyond Mobil's first POE to affect subsequently submitted plans and permit applications by virtue of the State's demand for still more (...continued)

B. Waiver.

The Government's waiver argument – which is premised on what Professor Palmer has called the "outmoded election of remedies doctrine," I Palmer, *supra*, § 4.13, at 481 – is substantially different than the one advanced in the trial court. *See* p. 18 n.17, *infra*. The Government now contends that Mobil "waived" its claim for material breach when, after the OBPA's enactment, it (1) continued to urge performance by "submitting a proposed plan of exploration," (2) attempted to protect its rights by "pursuing administrative proceedings" challenging North Carolina's CZMA objections, and (3) sought suspension of its leases pending those proceedings. Gov't Br. 42. This waiver argument fails for three independent reasons.

1. Like the rest of the Government's brief, the waiver argument incorrectly assumes that the extent of the breach was limited to the enactment of the OBPA and the Secretary's failure to approve Mobil's first POE within the 30 days required by OCSLA § 1340(c)(1). However, the Secretary's interpretation and application of the OBPA, as well as the fact that the Government would not cure its repudiation, only became clear when Secretary Lujan limited his April 1992 certification under the Act to Mobil's first POE and then refused to approve *even that POE* pending the completion of years of additional OBPA studies.

A month after the Secretary's April 1992 decision so interpreting and applying the OBPA, Conoco, Inc., filed the

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studies. In contrast to the CZMA, which introduced only a speculative *possibility* that Mobil's plans and applications *might* be delayed, the OBPA imposed a *certainty of substantial (and perhaps indefinite) delay for every permit*.

complaint initiating this case and provided notice to Mobil under Court of Federal Claims Rule 14. J.A. 1. On July 23, 1992, Mobil filed a motion for an enlargement of time to postpone the filing of its complaint "pending final Congressional action on the bill" that potentially would have mooted the issues in this case by providing statutory compensation for the North Carolina (as well as other OCS) leases. *See* Fed. Cir. App. 1005, 1008. Mobil filed its complaint on October 28, 1992, shortly after the 102nd Congress ended its session without providing a statutory resolution to the issue. J.A. 2. A waiver cannot occur unless "the injured party knows, or has reason to know, of the relevant facts ...." II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.19, at 511 (2d ed. 1998). Here, Mobil promptly filed suit upon learning the "relevant facts."

2. As Mobil has consistently pointed out, the enactment of the OBPA constituted an anticipatory repudiation of Mobil's leases. By legislating and implementing new and burdensome requirements in violation of the leases, the Government announced – before the time for performance under those leases had arrived – that it either could not or would not perform its obligations under the leases in the manner the parties had agreed. It is settled beyond dispute that, in the case of an anticipatory repudiation, "[t]he injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation or to retract his repudiation." *Restatement*, *supra*, § 257; *accord* U.C.C. § 2-610(b) (1989) (An injured party may "resort to any remedy for breach ... even though he has notified the repudiating party that he would await the latter's performance and has urged retraction."); 4 Corbin, *supra*, § 981, at 940 ("[M]ere delay in bringing a suit does not disentitle the injured party to relief. ... [O]ne who has received a definite repudiation is not to be penalized for his efforts to bring about its retraction and to get that which is due without a law suit.").

Mobil was not required to sue immediately following enactment of the OBPA without first learning the extent of the Government's breach and encouraging the Government to honor its obligations. When the scope of the OBPA became clear by virtue of the Secretary Lujan's April 1992 interpretation of the Act and congressional remedies were exhausted, Mobil promptly brought this action seeking restitution of its bonus payments. That is all the law required.[16]

3. An injured party waives its remedy for breach due to non-performance only by accepting the breaching party's continued performance *under the contract*. *See, e.g.*, *Restatement*, *supra*, § 373 cmt. a (party loses its right to restitution only by "acceptance or ... retention ... of performance" with knowledge of defects); *id.* § 246(1) (waiver only upon injured party's "acceptance or ... retention for an unreasonable time of the [breaching party's] performance"); II Farnsworth, *supra*, § 8.19, at 514 (same). The Government's own cases confirm this limitation on the waiver doctrine. *See, e.g.*, *ARP Films, Inc. v. Marvel Entertainment Group, Inc.*, 952 F.2d 643, 649 (2d Cir. 1991); *Cities Serv. Helex, Inc. v. United States*, 543 F.2d 1306, 1313-14 (Cl. Ct. 1976).

Here, Mobil accepted no performance from the Government because it tendered none – the OBPA prevented the Government from rendering even the first performance asked of it, *see* p. 11, *supra*, and even after the Act's requirements were finally satisfied, DOI *never* approved Mobil's POE, *see* Marathon Br. 15. While the Government

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[16] The Government apparently misses the irony of its waiver argument faulting Mobil for filing a POE for its four Manteo tracts, *see* Gov't Br. 40, 42, while simultaneously contending that Mobil has no right to complain of the OBPA regarding its one non-Manteo tract because it did not file a POE for that tract, *see id.* 39 n. 20.

may have taken other actions after enactment of the OBPA – *e.g.*, completion of the studies that were required by the Act, resolution by the Secretary of Commerce of the CZMA appeal – those actions were not part of the Government's promised "performance" under the leases.

Moreover, the Government has not ventured beyond the vaguest of generalities, *see* Gov't Br. 42, in attempting to explain how it "*substantial[ly]* change[d] [its] position in reliance" on Mobil's supposed affirmance of the lease contracts – a necessary element of its waiver claim. 5A Corbin, *supra*, § 1220, at 461 (emphasis added); *accord Riess v. Murchison*, 503 F.2d 999, 1008 (9th Cir. 1974) (requiring "*substantial* change of position in reliance" on plaintiff's action); *North American Graphite Corp. v. Allan*, 184 F.2d 387, 389 (D.C. Cir. 1950) (requiring "*material[]* change"). The administrative expenses incurred by the Government in receiving – but not approving – Mobil's POE, processing Mobil's CZMA appeal, and granting suspensions are *de minimis* compared to the restitution owed to Mobil and Marathon in the light of the Government's material breach.[17]

Finally, the Government has not even suggested that, in seeking suspensions and taking other actions to preserve its rights, Mobil actually "intended" to relinquish its claim for material breach.[18] *See, e.g., Havoco of America, Inc. v.*

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[17] The Government never argued in the Court of Federal Claims that its receipt of Mobil's POE or the Department of Commerce's processing of Mobil's CZMA appeal could serve as predicates for a waiver argument. Accordingly, the Government offered no evidence concerning the administrative expenses entailed in these actions. The same is true regarding the September 1992 suspensions sought by Mobil, which was the only predicate for the Government's waiver argument in that Court. *See* Fed. Cir. App. 1004.

[18] The Government's reliance on Mobil's suspension requests is flawed in other respects. First, the Government never explains how the grant of a suspension order in any way constitutes "performance" of its (...continued)

Hilco, Inc., 799 F.2d 349, 354 (7th Cir. 1986) ("[A]n essential element of waiver is that the injured party intended to affirm the contract and intended to abandon his right to recover damages. 'If the intention to waive is implied from conduct, the conduct should speak the intention clearly.'" (quoting *Bankers Trust Co. v. Pacific Employers Ins. Co.*, 282 F.2d 106, 111 (9th Cir. 1960)); *Ducheneaux v. Miller*, 488 N.W.2d 902, 911 & n.8 (S.D. 1992) ("[I]ntent to acquiesce or waive is essential to establishing a waiver to a breach of contract."); *Galesburg Clinic Ass'n v. West*, 706 N.E.2d 1035, 1037 (Ill. Ct. App. 1999) ("In the context of a breach of contract, waiver is the express or implied voluntary and intentional relinquishment of a known and existing right."). Mobil's initiation of this litigation and its subsequent active pursuit of the case conclusively show that it never intended to acquiesce in the Government's breach, to affirm the repudiated contract, or to waive its claims.

C. Remedy.

As Mobil pointed out in its Opening Brief – and as the Government has not disputed – upon a determination that the OBPA materially breached the OCS leases, Mobil is entitled to elect restitution as its remedy in this case. Mobil Br. 23-35. The Government's argument that Mobil's only remedy is an extension of its leases, *see* Gov't Br. 43-44, collapses with the refutation of its material breach argument.

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obligations under the leases. Second, the Government relies on correspondence that is not contained in the record. *See* Gov't Br. 42-43 & App. 1a-6a.

CONCLUSION

For the reasons stated above, the judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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